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In The Supreme Court Of The United States

OCTOBER TERM, 1993

ANITA GALLAGHER, PAUL B. GALLAGHER AND LAURENCE M. HECHT,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the conviction of petitioners for violations of the Virginia Securities Act, arising from their solicitation of loans to support the exercise of core First Amendment activities by the political movement to which they belonged, deny petitioners due process of law, where, prior to the indictment, unsecured, simple interest promissory notes had never been held to be "securities" by any court?

2. Did petitioners' convictions for violations of the Virginia Securities Act in connection with the solicitation of loans to fund core First Amendment activities violate their Constitutional rights, where application of that regulatory scheme would create an intolerable burden on the exercise of those rights?

3. Does the existence of extensive and inflammatory pretrial publicity on a national scale, to which the prosecuting authority has directly contributed, require content based voir dire to assure a fair and impartial jury, when the trial judge can not know the scope of the publicity to which the jurors have been exposed?

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1993

NO. _____

ANITA G. GALLAGHER,
PAUL B. GALLAGHER and
LAURENCE M. HECHT,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE VIRGINIA SUPREME COURT

The Petitioners, Anita G. Gallagher, Paul B. Gallagher and Laurence M. Hecht, respectfully requets that a writ of certiorari issue to review the judgment and opinion of the Virginia Supreme Court, entered in the above-entitled proceedings on July 30, 1993.

OPINIONS BELOW

The Virginia Supreme Court's unpublished denials of petitioner's petition for appeal and petition for rehearing are reprinted in the Appendix. (App. 1a, 30a)[1]. The Virginia Court of Appeals' unpublished per curiam opinion affirming petitioners' convictions is also reprinted in the Appendix. (App. 2a).

STATEMENT OF JURISDICTIONAL GROUNDS

The Virginia Supreme Court denied petitioners' request for a rehearing on July 30, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

APPLICABLE PROVISIONS OF LAW

1. Virginia Code Sections 13.1-501, 13.1-502, 13.1-504 - 510, 13.1-513, 13.1-514,

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[1] Materials cited as "App. 1a" and following are contained in volume "A" of the appendix under separate cover. Materials cited as "App. 1b" and following are contained in volume "B" of the appendix under separate cover.

13.1-514.1, 13.1-520, 18.2-178 are reprinted in pertinent part in the Appendix. (App. 31a).

2. Virginia Securities Act Rules 215, 300, 304 and Agreement for Inspection of Records are reprinted in pertinent part in the Appendix. (App. 59a).

3. Title 15, United States Code, Sections 77b and 77x are reprinted in pertinent part in the Appendix. (App. 66a).

4. 7B, Uniform Laws Ann., Sections 401, 409 are reprinted in pertinent part in the Appendix. (App. 68a).

5. United States Constitution, First, Fifth, Sixth and Fourteenth Amendments are reprinted in the Appendix. (App. 69a).

STATEMENT OF THE CASE

A. The Proceedings Below

In February, 1987, the petitioners were indicted separately on multiple counts of securities fraud involving the

issuance of unsecured, simple interest promissory notes in exchange for loans for political advocacy purposes. The indictments were amended in August, 1988. Petitioners agreed to be tried jointly and a jury trial commenced in the Circuit Court of Roanoke County on November 5, 1990. On January 7, 1991, the jury returned verdicts of guilty as to all counts. On March 28, 1991, the trial court sentenced Anita Gallagher to 39 years, Paul Gallagher to 34 years and Laurence Hecht to 33 years imprisonment.

Petitioners timely appealed their convictions to the Virginia Court of Appeals, asserting fifteen assignments of error. The court granted the appeal as to three of the assigned errors. On December 15, 1992, the court affirmed the convictions in an unpublished per curiam decision. (App. 2a).

Petitioners further appealed their convictions to the Virginia Supreme Court. That appeal was denied on June 25, 1993 (App. 1a), and a petition for rehearing before that court was denied on July 30, 1993 (App. 30a).

Each of the issues presented here was presented to the trial court. Each issue was also presented to the Virginia Court of Appeals in a petition for appeal. The due process claim, as to which the Court granted the writ, was then argued to that court on the merits. Each of the issues presented here were then presented to the Virginia Supreme Court in a petition for writ of error.

B. The Facts In This Case

1. The Due Process/First Amendment Issues

Petitioners are members of the National Caucus of Labor Committees

(NCLC), a movement dedicated to political and cultural change based upon the ideas and programs of Lyndon H. LaRouche, Jr.. The NCLC operated several corporate entities, including Caucus Distributors, Inc., a non-profit distribution company for political literature, and the Fusion Energy Foundation, a non-profit foundation promoting NCLC's scientific and economic views and programs. They financed their work through fundraising directed towards people who had expressed support for their political, social, economic and cultural agenda. The various advocacy campaigns undertaken by petitioners and other NCLC members ware financed by solicitation of individuals who had expressed support for their views on political, social, economic and cultural issues. This fundraising included contributions, loans which were evidenced by unsecured, simple interest

promissory notes, and the sale of subscriptions to movement publications.

No loans were solicited from any persons who had not received and read the movement's literature. (App. 18b). Furthermore, the purposes for which loans were solicited changed as different activities, events, and campaigns became the priority in the movement's political agenda. The Commonwealth's undercover agent testified at trial that the political nature of the entities was practically "pushed down your throat" by the solicitors. (App. 89b-90b).

The Commonwealth's own witnesses testified repeatedly that they were motivated, at least in significant part, by political considerations. (App. 29b-37b, 40b-41b, 46b-50b, 56b-57b, 61b-67b). Lenders provided funds for specific political purposes, including sponsorship

of civil rights marches and lobbying efforts. (App. 63b-65b).

The loans at issue in the indictments occurred between July, 1984 and December, 1986 (Paul Gallagher), January, 1985 and September, 1985 (Laurence Hecht) and July, 1984 and September, 1985 (Anita Gallagher).

On January 23, 1986, an investigator from the State Corporation Commission (SCC) wrote to Caucus, describing its loans as an "investment opportunity" which "may constitute a security." (App. 1b). The attorney for Caucus wrote to the SCC investigator on March 5, 1986, asserting that the notes in question were not securities, providing copies of notes, describing Caucus and the purpose of the loans, and noting the existence of serious First Amendment implications. He offered to answer any questions or provide further

information. (App. 2b-3b). The SCC did not respond to the letter from Caucus' attorney.

Petitioners were indicted on February 17, 1987. On February 19, 1987, the SCC held a hearing to determine whether a restraining order should be issued, preventing Caucus from continuing to solicit loans because the notes were unregistered securities. The Securities Director of the SCC also testified that his division did not even claim the notes were securities until shortly before this hearing.The SCC Chairperson stated at the hearing that "This is a case of 'first blush' to the Commission." (App. 4b). The SCC took the issue under advisement, requesting further briefs from the parties. Ultimately, the SCC conceded that "this is a case of first impression in Virginia" and that a "review of federal

court decisions reveals an admitted lack of clarity about the proper analysis to be used in determining whether a given instrument comes within the definition of a security." (App. 7b). All of the notes at issue in the criminal indictments preceded the concededly novel decision of the SCC that simple interest, unsecured promissory notes were securities.

2. The Voir Dire Issue

Prior to petitioners' trial, there was extensive publicity from the local and national media concerning the cases against petitioners and other related defendants. Altogether, 46 of the 63 venirepersons questioned in this case had heard of, or come into contact with, LaRouche or his political movement. Of the panel of 24 from which the jury was selected, 16 had had such contact.

The sources of the publicity were

many and varied. One juror remembered hearing about LaRouche in the national news on television and in a national magazine. (App. 16b). Another juror had heard LaRouche described as an extremist in the media. (App.17b). A third juror had heard stories on National Public Radio regarding LaRouche, some of his associates, fraud and telephone solicitations. (App. 15b). Other jurors had heard of LaRouche through the television news (App. 12b-14). One juror had also lived in Loudoun County, where the movement was headquartered, and had heard of LaRouche when he was living there. (App. 12b-13b)[2]

The prosecutors and law enforcement personnel had directly contributed to the

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[2] Venue was changed from Loudoun county in these cases due to excessive publicity, following the conviction of one of petitioners' co-defendants.

publicity in this case. They had appeared on national news and news magazine programs to discuss the cases, using highly inflammatory language. (App. 73b-78b). In addition, the Attorney General, whose assistant was the chief prosecutor, made the successful prosecutions of petitioners and their codefendants a campaign issue, including it in her campaign literature. (App. 83b-86b).

REASONS FOR GRANTING THE WRIT

I. PETITIONERS' INDICTMENT AND CONVICTION FOR SECURITIES FRAUD VIOLATED THE NOTICE REQUIREMENT OF THE DUE PROCESS CLAUSE, SINCE THERE WAS PERVASIVE UNCERTAINTY AS TO WHETHER UNSECURED PROMISSORY NOTES WERE SECURITIES, AND THE NOTES WERE ISSUED TO SUPPORT THE EXERCISE OF CORE FIRST AMENDMENT ACTIVITIES.

It is axiomatic that a criminal conviction may not stand where the defendant was not on notice, prior to the acts underlying his conviction, that his conduct was, in fact, illegal. E.g.,

People v. Dempster, 396 Mich. 700, 242 N.W.2d 381, 1976)(requirement of fair notice applies to state securities laws). While "the general rule that ignorance of the law or a mistake of law is no excuse to a criminal prosecution is deeply rooted in the American legal system," Cheek v. United States, 498 U.S. 192, 199 (1991), it is equally true that the Due Process Clause of the Fourteenth Amendment incorporates notions of fair notice or warning, Smith v. Goguen, 415 U.S. 566, 572 (1974), and prohibits states from using a criminal prosecution as a "vehicle to decide [a] pioneering interpretation" of its statutes. United States v. Critzer, 498 F.2d 1160, 1164 (4th Cir. 1974); also, United States v. Mallas, 762 F.2d 361, 365 (4th Cir. 1985); generally, Bouie v. Columbia, 378 U.S. 347 (1964).

[T]he Constitution mandates that

> "before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable [must] be prohibited with sufficient specificity to forewarn of the proscription of said conduct."

United States v. Colon-Ortiz, 866 F.2d 6 (1st Cir.), cert. denied, 490 U.S. 1051 (1989), quoting United States v. Anzalone, 766 F.2d 676, 678 (1st Cir. 1985). Where the result obtained would violate fair notice if effectuated by legislative action, "'the [due process] violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute.'" Bouie v. Columbia, 378 U.S. at 354-55 (quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 679-80 (1930)).

These principles must be applied with particular vigilance where, as here, the

"statute's literal scope ... is capable of reaching expression sheltered by the First Amendment...." Smith v. Goguen, 415 U.S. at 573. In such circumstances, the vagueness proscription inherent in the Due Process Clause, and its corollary, the notice requirement, "demand[] a greater degree of specificity than in other contexts." Id. Also, Smith v. California, 361 U.S. 147, 151 (1959). That vigilance is all the more essential when the statute, or its interpretation by the state courts, eliminates scienter as an element of the offense. Smith v. California, 361 U.S. at 151-52.

Each of the principles described above applies to the prosecution of these petitioners. The prosecution was premised on acts which occurred prior to any judicial or administrative interpretation of the relevant language in the Virginia

statute; judicial interpretations of comparable provisions under the federal securities act supported petitioners' position that the Act did not apply; even after the allegedly criminal acts had been committed, the agency charged with administrative enforcement of the Act conceded a lack of clarity in the statute; the statute's literal scope could and did reach protected First Amendment activities; and the state court interpretation of the statute in petitioners' own case eliminated the element of scienter from the crime.

The evidence at trial established conclusively that the statute could, and did, reach "expression sheltered by the First Amendment." The activities for which petitioners and their co-defendants were prosecuted involved the solicitation of funds to support the various activities

of the political-philosophical movement to which they belonged. Those activities were core First Amendment activities, including, advocacy on behalf of political candidates, the publication of books and magazines on current political, social, scientific and economic issues, critiques of government policies and programs, and the publication of a weekly newspaper firmly anchored in the movement's view of world politics, economics and social and cultural institutions. See, FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238, 251 (1986); Buckley v. Valeo, 424 U.S. 1, 14, 44-45 (1976).

The Commonwealth's own evidence established that loans were not solicited from persons who had not received and **read** the movement's literature. The solicitation of loans always occurred in the context of discussions between a

political supporter and a fundraiser concerning priority political projects within the movement's agenda, priorities which changed with political events. Notes were issued in exchange for loans to sponsor, among other overtly political activities, a civil rights march in Washington, D.C., a political conference, lobbying activities and advocacy on behalf of the Strategic Defense Initiative and the development of fusion energy. Lenders testifying on behalf of the Commonwealth, conceded that they gave money specifically for political purposes, sometimes lending money on one issue, but not another, consistent with their own political convictions. To establish the element of fraud at trial, the Commonwealth repeatedly relied on the comment made in some solicitations that putting funds in the movement was "safer than the banks."

(App. 19b-21b). This statement, however, made prior to the collapse of the Savings & Loan industry, was specifically made in the context of discussions expressing LaRouche's view that American financial institutions were bankrupt and in grave danger of collapse. (App. 21b-24b). According to the Commonwealth's lead witness, a former movement fundraiser, this ironical statement underscored the precariousness of the banking system by comparing it to the financial condition of the political movement. (App. 22b-24b). This is only the most dramatic demonstration that the statute under which petitioners were convicted can, and did, reach "expression sheltered by the First Amendment."

In connection with this prosecution, the Commonwealth has never been able to cite a single decision predating the acts

for which petitioners were prosecuted, from any court, state or federal, holding that unsecured, simple interest, promissory notes, which do not bestow ownership interest in any enterprise or activity, are securities, under either the Virginia Securities Act or the Federal Securities Act, or any other state securities statute. Nor has the Commonwealth been able to cite any such case decided before petitioner's indictment, in February, 1987. Worse yet, the Chairwoman of Virginia's State Corporation Commission, the agency charged with enforcement of the Securities Act, when requested to issue a cease and desist order only days after the issuance of the indictments, noted that the question of whether the notes at issue in this case were securities was one of "first blush," as a result of which the Commission

continued the matter for further briefing. Further, the Commission's opinion after the issuance of the indictments, aided by that additional briefing, conceded that "[t]his is a **case of first impression** in Virginia," and that "[a] review of federal court decisions reveals an admitted lack of clarity" about how to determine if a note is a "security." (App. 4b, 7b). This uncertainty, however, did not prevent the Commonwealth from convicting these petitioners of "knowing and willful" violations of that very statute or from sentencing them to prison terms of 33 to 39 years.

In fact, at the time the underlying acts were committed and the indictments secured, the law in the Fourth Circuit and the Eastern District of Virginia under the comparable federal statute indicated strongly that these unsecured promissory

notes were not securities. In Lawler v. Gilliam, 569 F.2d 1283 (4th Cir. 1978), the Court had held that the economic reality test enunciated in SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) was the appropriate test for determining whether notes are securities. Under Howey an instrument is a security if it represents:

> (1) an investment (2) in a common venture (3) with a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others. If an instrument fails to meet any one of the four elements of this test, then the instrument is not a `security.'

Epic Mortgage Insurance Litigation, 701 F.Supp. 1192, 1248 (E.D. Va. 1988), aff'd in part, rev'd in part, 910 F.2d 118 (1990) (emphasis added). The notes at issue here failed not just one element, but all of the elements, of the Howey test. There was no "common venture," nor

reasonable expectation of profits, and "profits" were not to be derived from the entrepreneurial or managerial efforts of others.[3]

Furthermore, according to Virginia's federal courts, fixed interest on a note under Howey did not make that note a security. Epic Mortgage Insurance Litigation, 701 F.Supp. at 1249; see,

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[3] There could have been no reasonable expectation of profit by many of the lenders. Literally thousands of the promissory notes issued were at 0% interest. Anita Gallagher was specifically convicted of a count involving a loan which the lender characterized as a "repayable contribution." This lender, according to his own testimony, was completely aware of the risks involved, provided the money to advance political goals, and hoped for repayment on the basis of the ability to broaden the base of political support. (App. 68b-71b). Another lent money to support a civil rights march. This is not the stuff from which profits are expected, or of which securities are made, and certainly no one could have been on notice that they would fall within the definition of a security.

also, Union Planters National Bank v. Commercial Credit Business Loans, 651 F.2d 1174 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981). However, both the SCC and the Commonwealth, in its proof at trial, relied on the simple interest rates on some notes to prove an investment or profit motive by the lenders.

Even more specifically, the local federal court had held in Principe v. McDonald's Corp. 463 F.Supp. 1149 (E.D.Va. 1979) that notes which were not negotiable, conferred no voting rights and did not appreciate in value, were not securities under either the Virginia or federal statutes. Of course, each of those characteristics applied to the notes at issue here. Indeed, a neighboring district court had held that "garden variety common law promissory notes," which these notes most clearly were, were

not securities. Oliver v. Bostetter, 426 F.Supp. 1082, 1085 (D.Md. 1977).

Faced with the fact that existing case law suggested that these notes were not securities, the Virginia courts finessed the due process obstacle by noting that the statutory language referred to "any note" as a security. (App. 2a, 1a). This argument, however, avails the Commonwealth little. The statute itself includes as prefatory language that a note is a security "[u]nless the context otherwise requires." Thus, by definition, **not** all notes are securities under the Virginia Act, the exact conclusion reached by the federal courts relative to their interpretation of the identical provision in the federal securities act. E.g. Oliver v. Bostetter, supra, ("despite the 'any note' language [in a security statute] ... not every note

is a security.") The Virginia courts simply ignored the hesitancy of the State's own regulatory agency, charged with administering the statute, to classify these notes as securities.[4]

Although the felony provisions of the Virginia Securities Act, as opposed to those in federal law, require proof that the defendant "knowingly and willfully" offered or sold securities, or failed to register, the State courts, in connection with these prosecutions, eliminated any scienter requirement. The trial judge refused an instruction tendered by petitioners that, to be convicted, the jury had to find that they knew that the notes were securities. The Court of Appeals affirmed that denial, holding that

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[4] If, indeed, any note is a security, there could have been no such hesitancy by the SCC.

such knowledge was not required by the statute and that "knowingly" meant only to that the act was not accidentally done. (App. 10a). In fact, each petitioner was convicted of one count of "knowingly and willfully fail[ing] to register as a broker dealer, with the intent to defraud," the "intent" element of which logically could not exist unless the defendant had known of a requirement to register. Even as to that count, however, the Virginia courts held that such knowledge was not an element of the offense.

In the absence of a scienter requirement, stricter standards must apply to a due process analysis of

> a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.

Smith v. California, 361 U.S. at 151, citing Winters v. New York, 333 U.S. 507, 509, 510, 518 (1948). Thus, petitioners were convicted

- in the absence of a definitive interpretation of applicable law;

- in the face of contrary interpretations of the same statute or identical statutory language;

- when the very agency charged with interpreting and enforcing the law was uncertain of its application to the transactions at issue; and

- in the absence of a scienter requirement;

for a violation of a statute that both on its face, and as applied to these petitioners, implicated core First Amendment expression.

Even under a lesser standard of scrutiny, the lack of notice apparent here would violate the notice requirements of the Due Process Clause. Under the higher standard of First Amendment scrutiny which

these facts require, however, these convictions fail to meet the requirements of the Constitution. The decision of the Virginia Court of Appeals, affirmed by the Virginia Supreme Court, denying petitioners' due process challenge, rejects and undermines the longstanding decisions of this Court, and can not stand if the laws of the states are to be applied equally and fairly to politically unpopular criminal defendants.

II. THE PETITIONERS' CONVICTIONS VIOLATE THE FIRST AMENDMENT BECAUSE APPLICATION OF THE STATE'S REGULATORY SCHEME FOR SECURITIES CREATES AN INTOLERABLE BURDEN ON THE EXERCISE OF CORE FIRST AMENDMENT RIGHTS.

If the criminal anti-fraud provisions of the Virginia Securities Act under which petitioners were convicted can be applied to these loans, then the entire Act must be applied. Application of this entire regulatory scheme, however, infringes upon

the First Amendment rights of: (a) solicitors (through registration requirements for "broker-dealers") or "agents;" (b) the entities receiving political loans (through registration requirements for "securities"); and (c) lenders (through compulsory disclosure of personal data of "customers" under the statute and regulations). The statutory scheme also does not afford the procedural due process required by this Court's First Amendment decisions.

The intolerable burden on the exercise of First Amendment rights inherent in the application of securities laws to type of political fundraising at issue here is readily apparent from the practical implications of complying with these laws.

Where, as here, political loans are sought on different issues at different

times, depending on a shifting political landscape, each such campaign would require separate registration of the intended notes as securities by the "issuer" involving all of the form filing, fees and disclosures specified in §§13.1-508-510. (App. 39a-49a). Further, all political fundraisers seeking loans, whether as broker-dealers or agents, would have to qualify themselves as securities dealers by taking and passing examinations for that profession. This is an absurdity, eliminating the type of volunteer fundraising activities common to political organizations, virtually forcing people to assume a new profession in order to take political loans. (App. 59a-66a). The financial records of the political organizations would be open to inspection by the state at all times and information on political supporters providing loans,

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including personal data and beliefs, would be required to be kept and subject to inspection. (App. 61a-65a).

Since the SCC can withhold registration of securities, broker-dealers or agents, and issue stop orders without any provision for immediate review by the courts, these burdens effect a prior restraint on speech. Exemption from registration requirements under §13.1-514.1(b) (App. 56a-57a), similarly allows the SCC unbridled discretion when the statute is applied in the context of political loans, a discretion which is impermissible under this Court's holdings concerning the procedural due process necessitated by the First Amendment. Riley v. National Federation of the Blind, 487 U.S. 781, 801-02 (1988); Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56 (1988).

This Court has not hesitated to prohibit governmental regulation of activities which truly do implicate the First Amendment rights of the participants, even when the regulations are directed at specific activities devoid, on their face, of First Amendment import. In NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), the Court prohibited the Board's exercise of jurisdiction over religious schools. Although the jurisdiction of the Board would have been limited to labor, not religious, matters,

> "[t]he resolution of [unfair labor] charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading

to findings and conclusions." (Emphasis added).

Id. at 502. See, also, Meek v. Pittenger, 421 U.S. 349 (1975)(striking down government support to secular educational activities in religious schools); Simon & Schuster v. Crime Victims Bd., 112 S.Ct. 501 (1991)(striking down "Son-of-Sam" law). Similarly, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230-231 (1987), the Court struck down a content based tax scheme because it would have required the authorities to examine the contents of publications to determine if they were subject to taxation.

To justify a regulatory scheme which burdens political speech, the State must show a compelling state interest. FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. at 251-52, 256; Bates v. City of Little Rock, 361 U.S. 516, 523-24 (1960).

Application of Virginia's security regulation scheme to efforts by political or religious organizations to raise funds to support their core First Amendment activities would necessarily include a detailed examination of the content of the statements of fundraisers to potential lenders. In this case, regulators would have had to approve the statement that the organization is "safer than the banks," even though that statement was concededly made only as political commentary on the country's economic instability.[5] They could examine the "accuracy" of the contents of the organization's

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[5] Curiously, in oral argument before the Court of Appeals, the Attorney General denied that the SCC would regulate such statements, even though that statement was used in this prosecution as evidence of fraud. The Attorney General's implausible denial indicates that even she recognized that such regulation would be violative of the First Amendment.

controversial book on the drug trade, *Narcotraffico*, or the statements of fundraisers as to their view of world politics. Clearly, the First Amendment could not tolerate such content examination as part of a regulatory scheme. See, Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1234-35 (4th Cir. 1989), cert. denied, 495 U.S. 904 (1990).

Of course, none of this means that the state must tolerate fraud by religious or political fundraisers, since true fraud can be prosecuted under the state's regular criminal fraud provisions. See, Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); see, also, (App. 58(a) - Virginia's fraud by false pretense statute. However, "[e]ven for proper purposes, when First Amendment protections are at risk, the state must use the least restrictive means to achieve its

objectives". Buckley v. Valeo, 424 U.S. 1, 64-66, 70-71, 74 (1976). The use of regular fraud provisions for prosecution, where appropriate, avoids the intolerable governmental intrusion inherent in subjecting political fundraisers to intrusive and burdensome regulatory schemes, developed for an entirely different profession, such as that contained in the securities laws.

The Securities Act, designed to regulate traditional commercial activities, is emphatically not the least restrictive means to achieve the Commonwealth's alleged purpose, in these prosecutions -- prevention of fraud. Its requirements impose undue and unconstitutional burdens on otherwise protected activities - solicitations of loans for political purposes, absent fraud. As noted previously, the Act and

the rules under it would require disclosure of the names of all lenders, the amounts of all loans and communications related to them -- **all of which would be subject to publication or state inspection.** Va. Code §§13.1-505(A)(2), 518(B), 524 (App. 31a); SCC Rules 200(B)(4), 301 (A)(1), 302(A), 302(B)(4). Such disclosure requirements place a heavy burden on the exercise of First Amendment rights.[6] Bates v. City of Little Rock, supra.

The SCC could "freeze future protected speech either on the basis of past misrepresentation . . . or on the basis of a past failure to comply with

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[6] The Commonwealth explicitly argued at trial that the evidence shows "a deliberate attempt on the part of these defendants to avoid the requirements of the [VSA], specifically the disclosure that comes along with registration." (App. 2695).

statutory requirements unrelated to speech", Va. Code § 13.1-506 (1,5,7), even though a state may "not enjoin future protected speech in order to punish past unprotected speech." Telco Communications, Inc. v. Carbaugh, 700 F.Supp. 294, 300 (E.D.Va. 1988), aff'd in part and rev'd in part, 885 F.2d 1225 4th Cir. 1989), cert. denied, 495 U.S. 904 (1990). It could prohibit fundraisers, as "broker-dealers," from making "unsuitable recommendations" to its lenders, or from using "any nonfactual data, material or presentation based upon conjecture, unfounded or unrealistic claims or assertions." SCC Rule 305 (A)(3), 18. Prior censorship such as that is the least compatible with First Amendment interests. Brown v. Hartlage, 456 U.S. 45, 61 (1982); Telco Communications, Inc. v. Carbaugh, 885 F.2d at 1233-34; see, Nebraska Press

Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

The SCC is granted broad prior restraint powers and the registration of securities does not become effective until the SCC so orders. VA. Code §13.1-510 (a, b, d). This would, for example, require prior identification of the purposes for which funds will be spent, Va. Code §13.1-510 (b)(9), which is also incompatible with First Amendment interests. Talley v. California 362 U.S. 60, 64-66 (1960); FEC v. Massachusetts Citizens for Life, Inc. 479 U.S. at 260-262. The SCC could use its stop order powers to restrain fundraising based upon any failure of the organization to furnish any requested information. Such powers would impermissibly restrain future speech because of past wrongdoing, related or unrelated, to speech. Telco Communications, Inc. v. Carbaugh, supra.

This is plainly not a case in which application of the regulatory scheme to a religious or political organization can be effected without implicating protected rights. See, e.g. Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) (application of the minimum wage laws to a religious based entity does not infringe the First Amendment, because the laws in no manner implicate its religious beliefs or activities); SEC v. World Radio Mission, Inc., 544 F.2d 535, 537 (1976) (no First Amendment infringement from application of regulatory scheme to real estate development venture independent of protected activities). Rather, it presents the clear and present danger of massive government interference with, and an intolerable burden on, the actual and immediate exercise of core First Amendment

rights. If notes issued in exchange for loans to fund a civil rights march and lobbying fall within the scope of the Securities Act, then notes issued in connection with fundraising for a church sponsored religious pilgrimage must also fall within that scope, as must similar fundraising for political candidates or parties. If funds thus raised to sponsor a conference of this political movement[7] are subject to regulation by the SCC, then funds similarly raised to sponsor a religious conference, or a conference of any political movement or party are subject to such the same regulation. And such regulatory requirements, and their significant burden on First Amendment activities, exist before and irrespective of any allegations of fraud.

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[7] See, App.43b-45b.

If the Virginia Securities Act may be so applied, then the federal Securities Act, as well as comparable state statutes, are subject to similar application, since their essential provisions are the same. Petitioners' convictions, therefore, portend the wholesale intrusion of every state government, as well as the federal government, into the fundraising activities of political and religious organizations, no matter how integrally related that fundraising is with the core First Amendment activities in which those organizations are involved. Indeed, at least three other state courts have held that these very notes are securities under its statute, albeit in the context of a civil proceeding. See, Caucus Distributors, Inc. v. Comm. of Commerce, 422 N.W.2d 264, 270-72 (Minn. App.), cert. denied, 488 U.S. 1006 (1988); Caucus

Distributors, Inc. v. Maryland Securities Comm'n, 320 Md. 313, 577 A.2d 783 (1990); Caucus Distributors, Inc. v. State, 793 P.2d 1048 (Alaska 1990). Those activities will, therefore, be subject to inconsistent regulation and rulings by the various enforcement agencies, creating yet a further burden on the exercise of First Amendment rights. Given the fact that the substantial burden imposed on First Amendment freedoms by the decisions of the Virginia courts may well recur under comparable state and federal statutes, review by this Court is appropriate. See, Simon & Schuster v. Crime Victims Bd., 116 L.Ed.2d at 486.

III. THE PETITIONERS WERE DENIED THEIR CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY BECAUSE THE TRIAL JUDGE, ALTHOUGH HE DID NOT KNOW THE SCOPE OF THE POTENTIALLY INFLAMMATORY PUBLICITY TO WHICH VENIREPERSONS HAD BEEN EXPOSED, REFUSED TO CONDUCT CONTENT BASED VOIR DIRE.

An accused has a fundamental right to

an impartial jury. Irvin v. Dowd, 366 U.S. 717, 721 (1961). "Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges." Mu'Min v. Virginia, 111 S.Ct. 1899, 114 L.Ed.2d 493, 509 (1991). While peremptory challenges are not constitutionally mandated, the underlying right to an impartial jury must not be undermined by ineffective voir dire. Irvin v. Dowd, 366 U.S. at 722-723. Similarly, while trial courts have broad discretion to decide if a venireman is qualified to serve as a juror, that discretion is limited by the constitutional mandate to impanel an impartial jury. Mu'Min v. Virginia, 114 L.Ed.2d at 508; Irvin v. Dowd, 366 U.S. at 722.

In cases involving extreme and highly

inflammatory publicity and prosecutorial interference and misconduct, specialized measures, including content questioning, are required from the court in voir dire to ensure impartiality. In such cases, content questioning provides the only reliable means for determining the true exposure of jurors to publicity and improper prosecutorial conduct. In turn, only with accurate knowledge of that exposure can a court evaluate a juror's ability to remain impartial based not only on that juror's assurances, but on all relevant information, including the potentially corruptive influence of prosecutorial misconduct.

In Mu'Min, this Court held that the refusal to allow content questioning did not render the trial fundamentally unfair in light of the type and extent of publicity surrounding the defendant's

trial. Mu'Min v. Virginia, 114 L.Ed.2d at 506. Justice O'Connor's concurring opinion, however, recognized that an exception to that general rule might exist which would require content based voir dire. Mu'Min v. Virginia, 114 L.Ed.2d at 510 (O'Connor, J., concurring).

Justice O'Connor, who joined in the 5-4 majority opinion, specifically restated her concurring opinion on the fact that the trial judge in Mu'Min had been fully exposed to all of the allegedly prejudicial information that might have been seen or heard by jurors. Mu'Min v. Virginia, 114 L.Ed.2d at 510. Thus, although the dissent argued that the trial judge should have done more to determine the extent of jurors' exposure, in light of the judge's full grasp of the relevant press coverage his decision to accept the jurors' own assurances of impartiality was

held to be reasonable. The majority argued more generally that the wide discretion granted to trial judges in conducting voir dire rested in large part on the judge's connection to the locality and "his own perception of the depth and extent of the news stories that might influence a juror." Mu'Min v. Virginia, 114 L.Ed.2d at 507. Mu'Min, however, did not ultimately resolve the question of whether the constitution requires content based questioning under different circumstances, where the publicity is inflammatory, rather than merely factual, national in scope, rather than merely local, unknown in its full extent and content by the trial judge, and engendered in large measure by the active participation of the prosecutor and law enforcement agents.

In connection with the prosecution of

petitioners and their co-defendants, the Attorney General or her assistants:[8]

> (1) made the conviction of these defendants a campaign issue, by promising the successful prosecution of these defendants in political speeches and in political literature that was distributed statewide, up to two months before the start of this trial (App. 83b-87b);
>
> (2) appeared on a national news documentary program, less than two months before the start of this trial, alleging that petitioners "wind up taking every penny these people have (App. 76b-78b);"
>
> (3) appeared on NBC Nightly News in May, 1990, alleging that money then being raised was being sent overseas to LaRouche's wife (App. 74b);

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[8] In a pointless attempt to create distance between the prosecution and the Attorney General, the Commonwealth at one point asserted that the Attorney General was not the prosecutor in this case. In fact, Mr. Russell, the courtroom prosecutor was an Assistant Attorney General, the assistant prosecutors were all Assistant Attorneys General, the support staff used was that of the Attorney General, the prosecutors' correspondence appeared on the stationary of the Attorney General, and the pleadings in the case were all issued from and sent to the Office of the Attorney General.

> (4) appeared on a national news program which strongly implied that $30,000,000 had been raised by fraud and that all 3,000 lenders had been defrauded, even though they knew that was untrue (App. 73b).
>
> (5) used, in political literature and speeches, and in their media statements, inflammatory language, including references to "bilking" the "elderly," "sweet-talk[ing] the elderly -- the infirm - -and the lonely," destroying the "last years" of "countless elderly women" and grinding down the "pride" of the elderly "under LaRouche's heel." (App. 83b-87b).

Comments from prosecutorial authorities are cloaked with an aura of importance and credibility. That fact, coupled with uninhibited access to the popular press, allowed the Attorney General to pander personal campaign agendas to the public by offering up a defendant in an already newsworthy case for sacrifice. "Collaboration between counsel and the press as to information affecting the fairness of a criminal trial

is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Sheppard v. Maxwell, 384 U.S. 333, 363 (1960). "[T]he prosecutor makes a serious mistake, one that can not be too severely condemned" when she releases prejudicial information to the press. Allen v. U.S., 4 F.2d 688, 697 (7th Cir. 1924). To have the "prosecutor himself feed the press with evidence is to make the state itself through the prosecutor, who wields its power, a conscious participant in trial by newspaper." Stroble v. California, 343 U.S. 181, 197 (1952), (Frankfurter, J., dissenting).

In commenting not only on the strength of her case, but in using the convictions obtained in previous cases to demonstrate the invincibility of her prosecutorial juggernaut against

petitioners, the Attorney General emphatically and unethically declared the defendants guilty before they were tried. See, In re Hansen, 584 P.2d 805 (Utah 1978); Mendez v. State, 362 S.W.2d 841, 842 (Tex. Crim. App. 1962); Sheppard v. Maxwell, 384 U.S. at 363; Virginia Code of Professional Responsibility, Disciplinary Rule 7-106. (App. 88b). In making pretrial comments on the heinousness of the crime, the prosecutor causes the government to default on its obligation in a criminal prosecution to see that justice is done. Commonwealth v. Pierce, 303 A.2d 209, 214-215 (Pa.), cert. den. 414 U.S. 878 (1973), citing Berger v. United States, 295 U.S. 78, 88 (1935); also, U.S. v. Stanford, 589 F.2d 285, 298 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); State v. Van Duyne, 204 A.2d 841, 852 (N.J. 1964), cert. denied, 380 U.S. 987

(1965). Furthermore, by making pre-trial campaign promises regarding the prosecution of the accused, the Attorney General engaged in prohibited conduct.[9] State v. Hohman, 420 A.2d 852 (Vt. 1980).

The collective result of this behavior was to make a mockery of the trial process and petitioners' right to a fair and impartial jury. The extent and content of the prosecutorial manipulation of the press outlined above, when combined with the fact that press coverage was already national in scope, resulted in a publicity scenario so prejudicial as to

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[9] In the Court of Appeals, petitioners', with the permission of the Court, expanded the record with the report of federal agents involved in the planning of the state-federal raid on LaRouche headquarters, which reflected their opinion that the Attorney General was more concerned with immediate personal political gain than with the safety of the officers involved in the raid. (App.) **fbi excerpts**

require specialized measures by the trial court to ensure a fair trial. That is particularly so since, in Virginia, the jury fixes the sentence. See, Hirschkop v. Snead, 594 F.2d 356, 367, n.12 (4th Cir. 1979). The constitutional imperative for such specialized measures was not lessened by this Court's decision in Mu'Min.

In petitioners' case, no such measures were taken, the voir dire was constitutionally deficient, and, as a direct result, they were denied a fair trial by an impartial jury. "'Adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.'" Mu'Min v. Virginia, 114 L.Ed.2d at 508, quoting Patton v. Yount, 467 U.S. 1025, 1031 (1984). Under the circumstances that existed in this case, effective voir dire

was essential to safeguard the accused's right to an impartial jury, a right which this Court has recognized to be vulnerable to corruption by media and improper prosecutorial interference, which was, in fact, so corrupted. See, Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 352 (1965); Sheppard v. Maxwell, supra.

The Alabama Court of Criminal Appeals has held that Mu'Min did not foreclose a requirement of individual voir dire where publicity was so extensive and of a type that jurors' assurances of impartiality could not be accepted at face value. Brown v. State, 571 So.2d 345 (Ala. Crim. App. 1990), aff'd on remand, 586 So.2d 991 (1991). In that case, the prosecutor had referred to the case as "one of the most graphically horrible . . . we've had since I've been a D.A.," and said that "if any

case called for the electric chair, Brown's does." 571 So.2d at 350-51. A police chief called the accused "extremely dangerous" and a "psychopathic killer who killed for the pleasure of it." Id. These and other comments fueled the prejudicial effect of the already extensive media coverage and mandated individual and intensive voir dire to ensure a fair and impartial jury. Id. The Georgia Supreme Court has interpreted Mu'Min similarly. See. Tyree v. State, 418 S.E.2d 16 (Ga. 1992) (requiring examination of voir dire where extensive publicity was compounded by prosecutor's inflammatory statements as to his intent to "kill" the defendant.) Id. at 17.

Finally, two federal courts have recognized that, while the exception was not reached under the facts of the cases before them, a prosecutor's statements to

the media could have a prejudicial effect so severe that more specialized or extensive voir dire would be required. See, Solomon v. Commissioner of Correctional Services, 786 F.Supp. 218 (E.D.N.Y. 1992) (prosecutor's comments not prejudicial where venirepersons had not seen his statements broadcasted and otherwise extensive voir dire shielded against prejudicial effect of publicity); Rock v. Zimmerman, 959 F.2d 1237 (3rd Cir. 1991), cert. denied, 112 S.Ct. 3036 (1992) (publicity involved was not unfair or sensationalistic, nor the result of police or prosecutorial initiative). Other federal decisions citing Mu'Min have specifically concluded that the brevity and factual accuracy of publicity, and often the lapse of time between publication and jury selection, supported the trial court's assertion of discretion.

See, U.S.v. Greer, 968 F.2d 433 (5th Cir. 1992); Washington v. Murray, 952 F.2d 1472 (4th Cir. 1991); Deel v. Jago, 967 F.2d 1079 (6th Cir. 1992); Britz v. Thieret, 940 F.2d 226 (7th Cir. 1991). Thus, the majority of courts have not read Mu'Min as foreclosing an inquiry into the amount and type of publicity nor the voir dire conducted in order to evaluate claims of manifest error. Nor have they presumed Mu'Min to hold that the adequacy of voir dire, including use of content questioning, could not be challenged in excessive publicity cases, especially where the inflammatory coverage has been precipitated by the prosecutorial team. Thus, the decision of the Virginia courts in petitioners' case is plainly at odds with those of several state appellate courts and federal courts. This court should grant the petition to resolve this

conflict and to set the parameters of the exception to the general rule set forth in Mu'Min.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that a writ of certiorari issue to review the judgment of the Virginia Supreme Court entered in the above-entitled proceedings.

Respectfully submitted,

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October, 1993

93-729

Supreme Court, U.S.
OCT 28 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1993

ANITA GALLAGHER, PAUL B. GALLAGHER AND LAURENCE M. HECHT,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I

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VIRGINIA:

Record No. 930421
Court of Appeals No. 0701-91-3

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 25th day of June, 1993.

Anita G. Gallagher, Paul Gallagher
and Laurence M. Hecht,

Appellants,

against

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Keenan took no part in the consideration of this case.

A Copy,

Teste:
David B. Beach, Clerk
By:
Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Record No. 0701-91-3

Present: Chief Judge Koontz, Judges Moon and Bray
Argued at Salem, Virginia

ANITA G. GALLAGHER, PAUL B. GALLAGHER and LAURENCE HECHT
v.
COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION PER CURIAM
DECEMBER 15, 1992

FROM THE CIRCUIT COURT OF ROANOKE COUNTY
Clifford R. Weckstein, Judge

Gerald T. Zerkin (Robert Godfrey; Kristine H. Smith; Edwin Vieira; Gerald T. Zerkin & Associates, on briefs), for appellants.

John H. McLees, Jr., Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

Amicus Curiae: (Scott T. Harper, on brief, for certain attorneys, retired judges and legislators), for appellants.

Anita G. Gallagher, Paul Gallagher and Laurence Hecht (defendants) were tried together and each convicted of

multiple counts of securities fraud in violation of Code §§ 13.1-501 - 13.1-522, the Virginia Securities Act (the Act).[1] On appeal, defendants contend that (1) the evidence was insufficient to prove that the offending transactions involved securities as contemplated by the Act, (2) the convictions infringed upon their due process and First Amendment rights, and (3) the trial judge erred by refusing to recuse himself. We disagree and affirm the decision of the trial court.

The parties are fully conversant with the record and this memorandum opinion recites only those facts necessary to a disposition of the issues before the Court.

The record discloses that defendants were employed as fund-raisers for the National Caucus of Labor Committees (NCLC), a political organization founded by Lyndon H. LaRouche, Jr. The complete organizational structure of the NCLC and its fund-raising activities and techniques were detailed by this Court in *Ascher v. Commonwealth*, 12 Va. App. 1105, 1108-12, 408 S.E.2d 906, 908-11 (1991), *cert. denied*, 61 U.S.L.W. 3061 (U.S. Oct. 5, 1992). Similarly, those facts relevant to the recusal issue now before the Court were examined in *Welsh v. Commonwealth*, 14 Va. App. 300, 314-17, 416 S.E.2d 451, 459-61 (1992). *See also Billington v. Commonwealth*, 13 Va. App. 341, 343, 412 S.E.2d 461, 462 (1991).

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[1] Defendants were convicted of one count of the offer and sale of an unregistered security with the intent to defraud in violation of Code § 13.1-507, one count of transacting business as an unregistered broker, dealer or agent with the intent to defraud in violation of Code § 13.1-504, and multiple counts of the unlawful sale of a security with the intent to defraud in violation of Code § 13.1-502.

Viewing the evidence in the light most favorable to the Commonwealth and according to it all reasonable inferences, *Traverso v. Commonwealth*, 6 Va. App. 172, 176, 366 S.E.2d 719, 721 (1988), the record sufficiently supports the finding that the "notes" or evidences of debt that were the subject of this prosecution constituted securities. In *Ascher*, we examined essentially identical instruments issued by the NCLC and concluded that "there [was] no context in which the jury could have found the notes at issue not to have been securities within the proscriptions" of the Act. 12 Va. App. at 1211, 408 S.E.2d at 916.

Here, like *Ascher*, "all the lenders were investing with an expectation of a return of principal and interest, and the organization was using this method to generate operational capital." *Id.* at 1125, 408 S.E.2d at 919. The notes "were offered for sale to a 'broad segment of the public,'" *id.* (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 68 (1990)), with assurances of "safety and a history of repayment" by the organization. *Id.* Finally, "[b]ut for the regulatory scheme imposed by [the Act] through the State Corporation Commission, there would be 'no risk reducing factor' or 'substantial regulation' of these notes." *Id.* at 1125-26, 408 S.E.2d at 919 (quoting *Reves*, 494 U.S. at 69). The trial court, therefore, properly denied defendants' motions to dismiss the indictments and to strike the Commonwealth's evidence.

Defendants next argue that the convictions violated the Due Process Clause[2] because they "lacked the prior notice that [the Act] would apply to these loans." This issue was recently resolved in *Welsh*, where we concluded that the Act

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[2] U.S. Const. amend. XIV, § 1.

"clearly and expressly includes 'notes' within the definition of a security" and provides "fair notice" that such instruments are "within its ambit." 14 Va. App. at 318, 416 S.E.2d at 461-62. Thus, the trial court again correctly denied defendants' motions to dismiss.

Defendants' complaint that application of the Act to "political loans" violates the First Amendment[3] is also without merit. A statute "in which 'the governmental interest is unrelated to the suppression of free expression'" is "content-neutral" and "constitutional so long as it furthers an important governmental interest and 'the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.'" *Hernandez v. Commonwealth*, 12 Va. App. 669, 673, 406 S.E.2d 398, 400-01 (1991) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). The clear and appropriate interests of the government in "informing" and "protecting [the public] against securities fraud" are promoted by the Act's registration and disclosure provisions, reasonable and proper safeguards which do not unduly infringe upon First Amendment rights. *Caucus Distribs., Inc. v. Maryland Sec. Comm'r.*, 577 A.2d 783, 792-93 (Md. 1990); *see Cantwell v Connecticut*, 310 U.S. 296, 306 (1940); *S.E.C. v. World Radio Mission, Inc.*, 544 F.2d 535, 538-39 (1st Cir. 1976); *Caucus Distribs., Inc. v. Commissioner of Commerce*, 422 N.W.2d 264, 272-73 (Minn. Ct. App. 1988), *cert. denied*, 488 U.S. 1006 (1989).

Lastly, defendants contend that the trial judge erred in refusing to recuse himself. This issue was also addressed in *Welsh*, where, finding "no substantial appearance of bias" in

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[3] U.S. Const. amend. I.

the same trial judge, we held that he "did not abuse his discretion in refusing to recuse himself." 14 Va. App. at 314, 317, 416 S.E.2d at 459, 461; *see Commonwealth v. Burns*, 240 Va. App. 171, 174, 395 S.E.2d 456, 457 (1990). Likewise, we "find no evidence to support [defendants'] allegation of bia sin the trial judge's rulings, findings, remarks, or demeanor at trial" in the instant case. *Welsh*, 14 Va. App. at 314, 416 S.E.2d at 459.

Accordingly, defendants' convictions are affirmed.

Affirmed.

VIRGINIA:

Record No. 0701-91-3
Circuit Court Nos. CR89000680
through CR89000695

In the Court of Appeals of Virginia on Monday the 30th day of March, 1992.

Anita G. Gallagher, Paul B. Gallagher and Laurence Hecht,

Appellants,

against

Commonwealth of Virginia,

Appellee.

Upon a Petition for Rehearing
Before Judges Benton, Coleman and Willis

On March 9, 1992 came the appellants, by counsel, and filed a petition praying that the Court set aside in part the judgment rendered herein on February 21, 1992 and grant a rehearing thereof.

On consideration whereof, the petition for rehearing is granted in part, the order entered herein on February 21, 1992 is vacated in part, and an appeal is awarded to the petitioner on the issues numbered III and IV in the petition for rehearing, to-wit:

III. The circuit court should have dismissed the indictments as violative of due process and the First Amendment.

IV. The indictments should be dismissed because the loans at issue are not securities.

The petition for rehearing is denied as to the other questions raised for the reasons previously stated in this Court's February 21, 1992 order.

On further consideration whereof, it is ordered that the time for filing the opening brief and appendix in this case shall run from the date of this order. The parties are directed to file designations which shall redesignate those parts of the record to be included in the appendix with regard to the question upon which an appeal was previously awarded and shall list the additional parts of the record to be included in the appendix with regard to the questions upon which an appeal has been awarded this date.

A Copy.

Teste:
Patricia G. Davis, Clerk

By: Cynthia L. McCoy,
Deputy Clerk

VIRGINIA:

Record No. 0701-91-3
Circuit Court Nos. CR89000680
through CR89000695

In the Court of Appeals of Virginia on Friday the 21st day of February, 1992.

Anita G. Gallagher, Paul B. Gallagher and Laurence Hecht,

Appellants,

against

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Roanoke County
Before Judges Benton, Coleman and Willis

This petition for appeal is granted in part and denied in part. And an appeal is awarded to the petitioners from a judgment of the Circuit Court of Roanoke County, dated March 28, 1991, with respect to the following question:

1. Did the trial judge err by refusing to recuse himself and improperly injecting himself into the trial?

No additional bond is required. The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reasons:

2. The trial court did not err in refusing to disqualify the Attorney General and her assistants. The record fails to disclose that the defendants were denied a fair trial or an impartial jury of that the actions of the Attorney General or her assistants threatened the defendants' right to a fair trial and an impartial jury.

3. The trial court did not err in refusing to dismiss the indictments on the grounds that they violated due process and the First Amendment. Code § 13.1-501 defines "security" as including a promissory note. The definition is sufficiently clear to place the public on notice that the Virginia Securities Act applies. *Ascher v. Commonwealth*, __ Va. App. __, __, 408 S.E.2d 906, 917 (1991). A political or religious organization which issues a security is not exempt from the Act by virtue of the First Amendment guarantees for protected speech.

4.(a) The trial court did not err in refusing to instruct the jury that the Commonwealth must prove that the defendants knew that the promissory notes were securities and deliberately did not register them in accordance with the Virginia Securities Act. Selling or offering to sell an unregistered and non-exempt security violated Code § 13.1-507 of the Virginia Securities Act, and it is not an element of the offense that the seller know that the instrument was required to be registered or that the agent offering the security for sale had to be registered.

4.(b) The trial court did not err in allowing Lewis Brothers, the Director of the Securities Division of the State Corporation Commission, to testify that the defendants had knowledge that the promissory notes were considered securities by the Virginia State Corporation Commission and by the agencies of other states which were investigating various persons involved with Paul Gallagher's organizations for security violations. The defendants opened the door to the inquiry and the evidence was in fair response thereto.

5. The trial court did not err in denying the defendants' motion to dismiss based on the ground that the loans and promissory notes issued as evidence thereof were not securities. The trial court did not err in ruling that the promissory notes were securities as defined by Code § 13.1-501. *Ascher v. Commonwealth*, __ Va. App. __, __, 408 S.E.2d 906 (1991).

6. On appeal we view the evidence in the light most favorable to the Commonwealth and grant to it all reasonable inferences fairly deductible therefrom. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). The evidence was sufficient to establish beyond a reasonable doubt that the defendants sold or offered for sale securities with an intent to defraud. The evidence showed, among other things, that the defendants misrepresented the financial condition of the organization and the fact that "lenders" were not being repaid.

7. The trial court did not err in refusing to grant defense Instructions 40 and 41. The instructions are not complete and correct statements of the law. *Bruce v. Commonwealth*, 9 Va. App. 298, 387 S.E.2d 279 (1990). The trial court adequately instructed the jury on the law pertaining to intent to defraud.

8. The trial court did not err by admitting evidence of lenders' complaints about non-repayment and the hardships which they had suffered. Such evidence was not introduced for the truth thereof, but to show that the defendants and agents of the organization were on notice of repayment problems and, in spite of that notice, continued to solicit loans. *Ascher v. Commonwealth*, __ Va. App. __, __, 408 S.E.2d 906, 915 (1991).

9. The trial court did not admit evidence that had not been properly authenticated. The trial court did not err by admitting into evidence the Hintz memorandum or the Burchett-Ascher tape. The Hintz memorandum and Burchett-Ascher recorded conversation were identified and authenticated by Hintz, who made the entries, and by Burchett, a party to the conversation. *Jones v. Commonwealth*, 228 Va. 427, 441-42, 323 S.E.2d 554, 562 (1984), *cert. denied*, 472 U.S. 1012 (1985).

10. The trial court did not err by denying the petitioners' motion to suppress the evidence obtained during the search by Larry Burchett or as a result of the search warrant obtained from his investigation. The petitioners had no standing to object to a search because they have made no showing that the search of the corporate premises infringed upon any area where either of the petitioners had a reasonable expectation of privacy. *United States v. Chuang*, 897 F.2d 646, 649-50 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 77 (1990).

11. The trial court did not err in seating any of the challenged jurors because the *voir dire* shows that they were qualified and free from exception. *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990), *cert. denied*, 112 S.Ct. 88 (1991); *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609 (1990), *cert. denied*, 111 S.Ct. 281 (1990). The

trial court did not err by denying the petitioners the right to question jurors about the content of articles they had read beyond that which the trial judge found in his sound discretion had reasonably permitted. *Mu'Min v. Virginia*, 111 S.Ct. 1899 (1991). The trial court did not abuse its discretion or commit error in its handling of the "Judge Roy Bean" incident. The trial court inquired into the matter and determined that the incident did not show any juror bias against the accuseds.

12. Assuming that the petitioners' convictions were based on the same acts that were used as the basis for the federal or Massachusetts convictions or convictions from other jurisdictions, dual sovereignty permits state and federal governments to separately prosecute defendants for the same acts which constitute a separate offense against another sovereign. *Heath v. Alabama*, 474 U.S. 82, 88-89 (1985); *Bartkus v. Illinois*, 359 U.S. 121, 136 (1959).

13. Code § 19.2-294 does not bar the petitioners' convictions. *Billington v. Commonwealth*, __ Va. App. __, __ S.E. 2d __ (1991) (Record No. 1927-89-3 decided December 3, 1991). Neither the double jeopardy clause of the Constitution nor Code § 19.2-294 bar the petitioners from receiving consecutive sentences for the sale of an unregistered security and for transacting business as a security broker or dealer without registering. The two are separate offenses consisting of separate and distinct elements. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Additionally, the petitioners were not sentenced for the same conduct in successive prosecutions. *Grady v. Corbin*, 110 S.Ct. 2084 (1990). Code § 19.2-294 does not bar consecutive sentencing because the same evidence was not required to sustain both convictions. *Estes v. Commonwealth*, 212 Va. 23, 181 S.E.2d 622 (1971).

14. The trial court did not err in instructing the jury as to the principles pertaining to an accessory before the fact because the evidence was sufficient to show that the petitioners "in some way planned, advised, or assisted in the commission of the crime knowing or having reason to know of intent of the principal to commit the crime." *McGhee v. Commonwealth*, 221 Va. 422, 270 S.E.2d 729 (1980); *Cirios v. Commonwealth*, 7 Va. App. 292, 33373 S.E.2d 164 (1988).

15. The trial court did not err or abuse its discretion by refusing to issue *subpoenae duces tecum* which were a "fishing expedition" in the hope of uncovering information material to their case. *Farrish v. Commonwealth*, 2 Va. App 627, 630, 346 S.E.2d 736, 738 (1986) (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)).

A Copy,
Teste:
Patricia G. Davis Clerk

By: Mary K. Ring,
Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Record No. 1407-90-3

Present: Judges Barrow, Coleman and Moon.

RICHARD E. WELSH
v.
COMMONWEALTH OF VIRGINIA.

April 7, 1992

FROM THE CIRCUIT COURT OF ROANOKE COUNTY
Clifford R. Weckstein, Judge

Gerald T. Zerkin (Kelley H. Brandt, Robert Godfrey, Gerald T. Zerkin & Associates, on brief), for appellant.

Eugene Murphy, Assistant Attorney General (Mary Sue Terry, Attorney General, Margaret Ann Walker, Assistant Attorney General, on brief), for appellee.

Defendant was convicted of violating Virginia Securities Act, and he appealed. The Court of Appeals, Coleman, J., held that: (1) Commonwealth met its burden of showing that testimony given by defendant under federal grant of immunity was not used to indict and prosecute him; (2) trial judge's connections with, correspondences received from and correspondence sent to members of organization with political views that allegedly differed from those of defendant did not require judge's recusal; and (3) Virginia Securities

Act provided fair notice that promissory notes were within its ambit.

. . .

III. Vagueness

[9] Welsh argues that the trial court erred in failing to dismiss the indictments because the statutes upon which they were based are unconstitutionally vague and thus, as applied to his case, violate due process. More specifically, Welsh contends that his prosecution under the Virginia Securities Act (VSA) offends due process because he did not at the time he was issuing promissory notes have notice or fair warning that promissory notes are securities governed by the VSA. The VSA expressly identifies notes as being included within the definition of securities. Furthermore, the VSA's treatment of promissory notes is not novel or atypical of the treatment afforded notes by the federal or other states' securities acts.

[10] The proposition that a statute may be unconstitutionally vague is premised upon the doctrine that no person "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972). The test to determine whether a statute is unconstitutionally vague is whether it gives a reasonably intelligent person fair notice that his contemplated conduct is forbidden. *Flannery v. City of Norfolk*, 216 Va. 362, 366, 218 S.E.2d 730, 733 (1975), *appeal dismissed*, 424 U.S. 936, 96 S.Ct. 1404, 47 L.Ed.2d 345 (1976).

Code § 13.1-501 defines "security" as "any *note*; stock; treasury stock; ... *evidence of indebtedness*" (emphasis added). The VSA clearly and expressly includes "notes" within the definition of a security, and we have previously so held. *See Ascher v. Commonwealth*, 12 Va. App. 1105, 408

S.E.2d 906 (1991). Thus, the statute gives notice that a note is a security. The statute is not vague. Moreover, such a broad definition of "security" is not atypical. *Id.* at 1122-26, 408 S.E.2d at 917-19 (commenting on the breadth of the analogous Federal Securities Acts). Other states have similarly defined a security to include promissory notes. *Caucus Distribs., Inc. v. Commissioner of Commerce*, 422 N.W.2d 264, 270-72 (Minn. Ct. App.), *cert. denied*, 488 U.S. 1006, 109 S.Ct. 786, 102 L.Ed.2d 778 (1988); *Caucus Distribs., Inc. v. Maryland Sec. Comm'n.*, 577 A.2d 783, 792-93 (1990); *Caucus Distrib. Inc., v. State*, 793 P.2d 1048 (Alaska 1990). The VSA provides fair notice that promissory notes are within its ambit, and Welsh's contention is without merit.

For the foregoing reasons, we affirm Welsh's convictions.

Affirmed.

COURT OF APPEALS OF VIRGINIA

Record No. 1011-89-4

Present: Judges Coleman, Keenan* and Moon
Argued at Alexandria

ROCHELLE JOYCE ASCHER
v.
COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE SAM W. COLEMAN III
AUGUST 13, 1991

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY
Carleton Penn, Judge Designate

John P. Flannery, II for appellant.

John B. Russell, Jr., Senior Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

*Justice Keenan participated in the hearing and decision of this case prior to her investiture as a Justice of the Supreme Court of Virginia.

. . . [Excerpt only]

III. JURY INSTRUCTIONS

Definition of a Security

Ascher claims the instruction to the jury attempting to define a security was inadequate. She argues the instruction provided the jury with no understanding of the law sufficient for the jury to decide whether the promissory notes given by Ascher or at her direction to the lenders were, in fact, securities. The jury instruction told the jury that all promissory notes are securities. Ascher argues that many promissory notes are, in fact, not securities. Ascher contends the court should have given the instruction which she offered, or one comparable, which would have told the jury when a promissory note is not a security in order that the jury could have determined whether the notes at issue fell in the category of a security.

"Securities" are often defined in various references by merely giving examples of the numerous instruments which are
commonly known as securities. However, securities are "[e]vidences of obligations to pay money ... instruments giving to their legal holders rights to money or other property; they are therefore instruments which have intrinsic value and are recognized and used as such in the regular channels of commerce." Black's Law Dictionary 1354 (6th ed. 1983). The jury instruction which the court gave defining a security as a note or other evidence of indebtedness was taken verbatim from the definition of a security contained in

Code § 13.1-501 of the Virginia Securities Act.[4] Instruction 17 from the court provided:

> The term "security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

The instruction was a correct statement of the law. However, the duty to properly instruct the jury is not always "discharged ... by reading the applicable statute to the jury."

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[4] Code 13.1 501 reads:

"Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. However, this definition shall not apply to any insurance policy, endowment policy, annuity contract, variable annuity contract or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to the supervision or control of the Commission's Bureau of Insurance when the form of such policy or contract has been duly filed with the Bureau as now or hereafter required by law

Dowdy v. Commonwealth, 220 Va. 114, 116, 255 S.E.2d 506, 508 (1979) (citing *U.S. v. Harris*, 346 F.2d 182, 184 (4th Cir. 1965)).

The question which Ascher raises is whether the court erred by failing to provide the jury with a more complete definition which would provide them with the standard needed to determine whether the promissory notes were non-securities. We hold the instruction was adequate because, on these facts, there is no context in which the jury could have found the notes at issue not to have been securities within the proscriptions of Code §§ 13.1-520 and 13.1-501. Therefore, there were no facts to support the giving of Ascher's proffered instruction or a comparable instruction defining when a promissory note or evidence of indebtedness is not a security.

> A reviewing court's responsibility in reviewing jury instructions is "to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises."... [A] jury must be informed as to the essential elements of the offense; a correct statement of the law is one of the "essentials of a fair trial."

Darnell v. Commonwealth, 6 Va. App. 485, 488, 370 S.E.2d 717, 719 (1988) (citation omitted).

Ascher does not challenge that the trial court properly instructed the jury as to the elements of securities fraud. The gravamen of the offenses charged under Title 13.1 is the intent to knowingly and willfully violate the provisions of the statute as provided in Code § 13.1-520(A). *See* fn. 1, *supra*. The jury was required to determine, upon being presented with the appropriate definitions and elements, whether Ascher had the requisite intent to defraud. Thus, if the definitional

instruction of a security was adequate, the instructions allowed the jury to determine whether Ascher violated Code § 131.1-520(A).

In general terms, we agree with Ascher that the instruction given by the trial court, although a correct statement of the law, may in other circumstances have been insufficient to define when a commercial instrument is or is not a security. However, on the facts in this record, no elaborative instruction was necessary because there was no theory or basis which would have permitted the fact finder to conclude that the notes or evidence of indebtedness were not securities.

The Virginia Securities Act is, by design, very broad in its scope and coverage. "[F]ederal courts have construed broadly the disclosure and regulation requirements of the federal [Securities] Acts. As a corollary, they read narrowly the exemption provisions.... We believe Virginia's Act should receive similar construction." *Pollok v. Commonwealth*, 217 Va. 411, 413, 229 S.E.2d 858, 860 (1976)(citation omitted). *See Reves v. Ernst & Young*, 110 S. Ct., 945, 949 (1990) ("In defining the scope of the market that it wished to regulate, Congress painted with a broad brush"). In *Reves*, a unanimous Court acknowledged the well-recognized legislative intent to provide broad coverage for regulating securities and, based upon that intent, broadly defined "a note" as found in the definition of "security," terms common to both the federal and Virginia statutes.[5] The *Reves* Court established a three-step approach in determining when a note is a security, which analysis

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[5] *See* Code § 13.1-501, fn. 1, *supra*. For the virtually identical federal definition, *see Reves*, 110 S. Ct. at 948.

begins with a focus on the language of the statute: "[A] note is *presumed* to be a 'security.'" *Reves*, 110 S. Ct. at 952 (emphasis added). Similarly, we hold that under the Virginia Securities Act, a promissory note is presumed to be a security.

The presumption that a note is a security may be overcome by showing that the instrument does not have the characteristics or qualities of a security. "[T]hat presumption may be rebutted *only* by a showing that the note bears a *strong* resemblance ... to one of the enumerated categories of instrument," which the Court declared were notes that did not have the character of a security. *Reves*, 110 S. Ct. at 952 (emphasis added). The *Reves* Court defined a non-exclusive list of notes issued as part of commercial financing arrangements, which had been previously enumerated by the Second Circuit in *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1138 (2nd Cir. 1976), and expanded by that Court in *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 939 (2nd Cir.), cert. denied, 469 U.S. 884 (1984). Those notes, which are generally non-securities, include:

> the note delivered in consumer financing, the note secured by mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a "character" loan to a bank customer, short-term notes secured by an assignment of accounts receivable, a note which simply formalizes an open-account debt incurred in the ordinary course of business ... and "notes evidencing loans by commercial banks for current operations."

Reves, 110 S. Ct. at 951 (citation omitted). The notes which Ascher offered or sold do not resemble any of the notes defined in *Reves* as not constituting a security.

"If an instrument [specifically a note] is not sufficiently similar to an item on the list, the decision whether another category should be added is to be made." *Reves*, 110 S. Ct. at 952. The Supreme Court identified in *Reves* four characteristics which are common to the specified notes that are not securities, and which should be considered in determining which other notes are non-securities. Thus, if a promissory note does not resemble any of those commonly recognized commercial instruments which are not considered securities, the court must consider and decide whether the note may fall within a broader definition of a promissory note that is not a security.

The first factor is "the motivations" which would influence the buyer's and seller's decision in entering into the transaction. If the seller is raising operational funds for an enterprise and the buyer is interested in profit,[6] the instrument is most likely to be a "security." *Reves*, 110 S. Ct. at 952. The second factor is the "plan of distribution" set up for the notes. *Id.* Offering notes to a "broad segment of the public" is all that is necessary to establish the "requisite 'common trading'" to qualify the note as a security. *Id.* at 953. The third factor is the "reasonable expectations of the investing public." Id. at 952. Where the public reasonably perceives the instrument to be an investment, this factor alone qualifies it as a security even when an economic analysis of those circumstances unique to a transaction would suggest that the note is not a security. Id. at 953. The fourth factor is whether there exists some other "regulatory scheme" applicable to the transaction or instrument which would "significantly" reduce the risk to the buyer or to the public of

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[6] The Court emphasized "that by 'profit' in the context of notes we mean 'a valuable return on an investment,' which undoubtedly includes interest." *Reves*, 110 S. Ct. at 952 n.4.

such an investment if the securities act did not control. Examples of such regulatory schemes include the federal deposit insurance corporation and federal banking laws. *Id.* at 952-53.

The facts in the *Reves* case are sufficiently similar to those here to be instructive. Ernst & Young made no claim that the promissory notes which had been issued by a farmer's cooperative to raise general operations funds bore a family resemblance to any of the enumerated categories of notes which are considered non-securities. Neither does Ascher. In *Reves*, the Supreme Court had to determine whether there had been a sufficient showing that the notes failed to meet the criteria for those notes which are considered securities so that they could be classified as non-securities.[7]

Applying the "motivations" criterion, the Court in *Reves* observed that the notes were issued "in an effort to raise capital for its general business operations, and purchasers bought them in order to earn a profit in the form of interest." *Id.* at 952. The same is true with all the notes issued by Ascher. Ms. Waddell's notes (counts seven through nine) were for eight percent and six percent interest per annum. She testified that this rate of return was greater than that which she was making and a significant factor in her investment decision. The notes sold to Dr. Allen (count 11) paid interest ranging as high as twelve percent to fifteen percent per annum. Some of the notes he purchased with money from his self-directed pension fund were required by law to be investments from which he would realize a profit.

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[7] Since formulating this test in 1976, the Second Circuit has added to its list of notes which do not resemble securities only once, in *Chemical Bank v. Arthur Anderson & Co.*, 726 F 2d 930 (2nd Cir.), *cert. denied*, 469 U.S. 884 (1984).

The notes which Ascher and her confederates issued to Robert Ware (count four) paid commercially competitive interest rates, which he testified was a factor in his investment decision. Ascher told Larry Burchett (count ten) that the corporations paid prevailing interest rates on the promissory notes. In her recorded sales presentation to Mr. Burchett, Ascher consistently referred to the operational use of the loan proceeds. There came a time in late 1985 when a ceiling was established, whereby no more than forty percent of the operational expenses of the organization could come from loans. Prior to that, sixty percent of the operational expenses were paid with the proceeds from the sale of notes. Thus, the evidence shows that all the lenders were investing with an expectation of a return of principal and interest, and the organization was using this method to generate operational capital.

As to the "plan of distribution" factor, the Court in *Reves* observed that notes were offered to non-members as well as members of the issuing co-operative. The fact that the notes were not sold or offered for sale on an open exchange was not the controlling factor. The significant fact was that the notes were offered for sale to a "broad segment of the public." *Reves*, 110 S. Ct. at 953. The distribution scheme here involves a much broader segment of the public than did the plan in Reves. By March 1985, Ascher and her organization had marketed more than $10 million in promissory notes to over 2,000 people throughout the United States. By December 1985, the amount of money raised by loans had grown to $30 million.

Regarding the "public perception" factor, in Reves the co-operative characterized the notes as investments and stressed that they were "safe" and "secure." *Id.* at 948. "In these circumstances, it would be reasonable for a prospective purchaser to take the Co-Op at its word." *Id.* at 953. Here

again, Ascher sold the notes as "investments," and safety and a history of repayment was consistently stressed by her and relied upon by the investors.

As to whether the notes were subject to "alternative methods of regulation," the Court in *Reves* observed: "[F]inally, we find no risk-reducing factor to suggest that these instruments are not in fact securities. The notes are uncollateralized and uninsured. Moreover ... the notes here would escape federal regulation entirely if the Acts were held not to apply." *Id.* That description of the promissory notes also applies to the notes which Ascher issued on behalf of NCLC. But for the regulatory scheme imposed by the Virginia Securities Act through the State Corporation Commission, there would be "no risk reducing factor" or "substantial regulation" of these notes, which were being aggressively marketed to investors nationwide by phone and personal contact.

In sum, no evidence exists from which a fact finder could reasonably have found that Ascher overcame the presumption that the notes at issue were securities. Having not presented any evidence to overcome that *prima facie* presumption, she was not entitled to an instruction to the jury, other than the one given by the trial court, which would have permitted the jury to have found the notes resembled any of the instruments not common to a security.

VIRGINIA:

Record No. 0701-91-3
Circuit Court Nos. CR89000680
through CR89000695

In the Court of Appeals of Virginia on Friday the 19th day of February, 1993.

Anita G. Gallagher, Paul B. Gallagher and Laurence Hecht,

Appellants,

against

Commonwealth of Virginia,

Appellee.

Before Chief Judge Koontz, Judges Moon and Bray

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 15th day of December, 1992 and grant a rehearing thereof, the said petition is denied.

A Copy,
Teste:
Patricia G. Davis, Clerk

By:
Deputy Clerk

VIRGINIA:

Record No. 0701-91-3
Circuit Court Nos. CR89000680
through CR89000695

In the Court of Appeals of Virginia on Friday the 19th day of February, 1993.

Anita G. Gallagher, Paul B. Gallagher and Laurence Hecht,

Appellants

against

Commonwealth of Virginia,

Appellee.

Upon a Petition for Rehearing En Banc
Before the Full Court

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 15th day of December, 1992 and grant a rehearing en banc thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing en banc in this case. Code § 17-116.02(D).

A Copy,
Teste:
Patricia G. Davis, Clerk
By:
Deputy Clerk

VIRGINIA:

Record No. 930421
Court of Appeals No. 0701-91-3

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of July, 1993.

Anita G. Gallagher, Paul B. Gallagher and Laurence Hecht,

Appellants,

against

Commonwealth of Virginia,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 25th day of June, 1993 and grant a rehearing thereof, the prayer of said petition is denied.

Justice Keenan took no part in this consideration of this case.

A Copy,

Teste:
David B. Beach, Clerk
By:
Deputy Clerk

Code of Virginia

§ 13.1-501. Definitions.

When used in this chapter, unless the context otherwise requires:

(a) "Commission" means the State Corporation Commission of Virginia.

(b) "Agent" means any individual who, as a director, officer, partner, associate, employee or sales representative of a broker-dealer or issuer, effects or undertakes to effect sales of securities, otherwise than on behalf of an issuer offering a security exempted by clause (1), (2), (3), (4), (7), (10) or (11) of § 13.1-514(a).

(c) "Broker-dealer" means any person engaged in the business of selling any type of security other than an interest or unit in a condominium as defined in § 55-79.2(c) of the Code of Virginia or cooperative housing corporation for the account of others or for his own account otherwise than with or through a broker-dealer or agent, but does not include a bank, a trust subsidiary formed under § 6.1-32.1 et seq., an issuer or an agent.

(d) "Guaranteed" means guaranteed as to payment of principal, interest or dividends.

(e) "Issuer" means any person who issues or proposes to issue a security, except that

(1) With respect to certificates of deposit, voting trust certificates or collateral trust certificates, and with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons

performing similar functions) or of the fixed, restricted management or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of manager;

(2) With respect to equipment trust certificates or like securities "issuer" means the person by whom the equipment is or is to be used;

(3) With respect to oil, gas or other mineral leases, rights or royalties or interests therein, "issuer" means the owner of any such lease, right, royalty or interest (whether whole or fractional) who creates fractional interests therein for the purpose of offering to more than five persons.

(f) "Nonissuer distribution" means any transaction not directly or indirectly for the benefit of the issuer.

(g) "Person" means an individual, a partnership, a corporation, an unincorporated association, a government, a subdivision of a government or a trust in which the interests of the beneficiaries are evidenced by securities.

(h)(1) The term "sale" or "sell" includes every contract of sale of, contract to sell, or disposition of a security or interest in a security for value.

(2) The term "offer" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(3) For the purposes of Article 4 (§ 13.1-507 et seq.) of this chapter the terms defined in this subsection shall not include negotiations or agreements between the issuer and any underwriter or among underwriters; or any transaction by the

pledgee of a security unless made directly or indirectly for the benefit of the issuer.

(4) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing shall be deemed to constitute part of the subject of such purchase and to have been offered and sold for value.

(5) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same issuer or of another person, and every sale or offer, of a security which gives the holder thereof a present or future right or privilege to convert such security into another security of the same issuer or of another person, shall be deemed to include an offer of such other security.

(i) "Securities Act of 1933," "Securities Exchange Act of 1934" and "Investment Company Act of 1940" mean the federal statutes of those names as now or hereafter amended.

(j) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate of subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; oil, gas or other mineral lease, right or royalty, or any interest therein; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. Provided, however, that this definition shall not apply to any insurance policy, endowment policy, annuity contract, variable annuity contract or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to

the supervision or control of the Commission's Bureau of Insurance when the form of such policy or contract has been duly filed with the Bureau as now or hereafter required by law.

§ 13.1-502. Unlawful offers and sales.

It shall be unlawful for any person in the offer or sale of any securities, directly or indirectly,

(1) To employ any device, scheme or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser. (1956, c. 428.)

§ 13.1-504. Registration.

(a) It shall be unlawful for any person to transact business in this Commonwealth as (i) a broker-dealer or an agent, except in transactions exempted by subsection (b) of § 13.1-514, unless he is so registered under this chapter; or (ii) an investment advisor or investment advisor representative unless he is so registered under this chapter.

(b) The registration of an agent shall be deemed effective only so long as he is connected with a specified

broker-dealer registered under this chapter or a specified issuer. When an agent begins or terminates a connection with a broker-dealer or issuer, both the agent and the broker-dealer or issuer shall promptly notify the Commission. An agent who changes his connection from one broker-dealer or issuer to another shall be required to file a new application of registration and pay the necessary fee in accordance with § 13.1-505. It shall be unlawful for any broker-dealer or issuer to employ an unregistered agent. No agent shall be employed by more than one broker-dealer or issuer.

§ 13.1-505. Procedure for registration.

(a) A broker-dealer, investment advisor, investment advisor representative or agent may be registered after filing with the Commission, or any entity designated by order or rule of the Commission, an application containing such relevant information as the Commission may require. He shall be registered if the Commission finds that:

(1) He is a person (and, in the case of a corporation or partnership, the natural persons who are the officers, directors or partners or who otherwise control such corporation or partnership are persons) of good character and reputation;

(2) He intends to maintain his business records in accordance with the rules of the Commission;

(3) His business knowledge and conduct and his financial responsibility are such that he is a suitable person to engage in the business;

(4) He has supplied all information required by the Commission;

(5) He is not subject to the revocation provisions of § 13.1-506; and

(6) He has paid the necessary fee.

(b) The Commission may require as a condition of registration or renewal of registration the filing by a broker-dealer or investment advisor of a reasonable surety bond conditioned as the Commission may require for the protection of investors not in any case exceeding $25,000 in penalty amount as evidence of financial responsibility except that no bond shall be required where the net worth of the broker-dealer or investment advisor exceeds $25,000.

(c) The Commission may require as a condition of registration the passing of a written examination as evidence of knowledge of the securities or investment advisory business.

(d) All registrations and renewals thereof shall expire annually in accordance with rules and regulations promulgated by the Commission.

(e) Each application for a renewal of a registration shall be filed with the commission or any entity designated by order or rule of the Commission. Upon application for a renewal of a registration the Commission shall have jurisdiction to determine, as of such time, the propriety of the renewal registration.

(f) Each application for a registration or renewal of a registration as a broker-dealer or investment advisor shall be accompanied by a nonrefundable fee of $200, payable to the Treasurer of Virginia or any entity designated by order or rule of the Commission.

(g) Each application for a registration or renewal of a registration as an agent or investment advisor representative shall be accompanied by a nonrefundable fee of not less than thirty and not more than fifty dollars, as established by order or rule of the Commission, payable to the Treasurer of Virginia or any entity designated by order or rule of the Commission.

(i) The Commission shall either grant or deny each application for registration within thirty days after it is filed. However, if additional time is needed to obtain or verify information regarding the application, the Commission may extend such period as much as ninety days by giving written notice to the applicant. No more than three such extensions may be made on any one application. An extension of the initial thirty-day period, not to exceed ninety days, shall be granted upon written request of the applicant.

(j) A renewal of registration shall be granted as of course upon receipt of the proper application and fee together with any surety bond that the Commission may pursuant to subsection (b) require unless the registration was, or the renewal would be subject to revocation under § 13.1-506. (1956, c. 428; 1974, cc. 382, 479; 1980, c. 222; 1981, c. 244; 1984, c. 771; 1987, c. 678; 1990, c. 5; 1991, c. 281; 1992, c. 18.)

§ 13.1-506. Revocation of registration.

The Commission may, by order entered after a hearing on notice duly served on the defendant not less than thirty days before the date of the hearing, revoke the registration of a broker-dealer, investment advisor, investment advisor representative or agent, or refuse to renew a registration if an application for renewal has been or is to be

filed, if it finds that such an order is in the public interest and that such broker-dealer, investment advisor or any partner, officer or director of such broker-dealer or investment advisor, or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by such broker-dealer or investment advisor or that such agent or investment advisor representative:

(1) Has engaged in any fraudulent transaction;

(2) Is insolvent, or in danger of becoming insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature;

(3) Has been adjudicated mentally incompetent or is a person for whom a committee or guardian has been appointed and is acting;

(4) Has been convicted, within or without this Commonwealth, of any misdemeanor involving a security or any aspect of the securities or investment advisory business or any felony;

(5) Has failed to furnish information or records requested by the Commission concerning his conduct of the securities or investment advisory business; or

(6) [Repealed.]

(7) Has failed to conduct his securities or investment advisory business in accordance with the rules of the Commission. (1956, c. 428; 1974, c. 479; 1981, c. 244; 1987, c. 678.)

§ 13.1-507. Registration requirement.

It shall be unlawful for any person to offer or sell any security unless the security is registered under this chapter or the security or transaction is exempted by this chapter. (Code 1950, § 13-110; 1956, c. 428.)

§ 13.1-508. Registration by notification.

(a) The following securities may be registered by notification:

(1) Any security whose issuer (which, for the purposes of this subsection, shall include any predecessor by merger, consolidation or acquisition of assets) has been in continuous operation for at least five years if there has been no default within the past three fiscal years in the payment of principal, interest or dividends on any security of the issuer with a fixed maturity or a fixed interest or dividend provision, and (where the security being registered does not have a fixed maturity or a fixed interest or dividend provision) (A) the issuer is a corporation which has assets of at least $500,000 after deduction of depreciation and other reserves, which has a net worth of at least $10,000, which is incorporated under the laws of this Commonwealth and which conducts a substantial portion of its business in this Commonwealth, or (B) the issuer during its past three fiscal years has had average net earnings applicable to all securities without a fixed maturity or a fixed interest or dividend provision (whether of one or more classes) outstanding at the date when the registration statement is filed (i) aggregating at least five percent of the amount of such outstanding securities as measured by their maximum public offering price or their market price on a day within thirty days of the date of filing the registration statement, whichever is higher, or their book value on a day within

ninety days of the date of filing the registration statement if there is neither a readily determinable market price nor a public offering price or (ii) if no such securities are outstanding, then aggregating at least five percent of the amount of such securities then offered for sale based upon the maximum price at which such securities then offered for sale; and all accounting determinations required by this section shall be made in accordance with generally accepted accounting practices. Noncumulative preferred stock shall be deemed for the purposes of this subsection a security with a fixed dividend provision.

(2) Any security registered for nonissuer distribution if (i) any security of the same class has ever been registered or (ii) the security being registered was originally issued pursuant to an exemption in this chapter.

(b) A registration statement under this section shall state the facts showing eligibility of the securities for registration by notification, the amount and maximum offering price of the securities proposed to be offered in this Commonwealth, and a copy of any prospectus to be used in connection with the offering. It shall be accompanied by a fee of 1/20 of one percent of the maximum offering price of the securities proposed to be offered in this Commonwealth; provided that the fee shall not be less than $100 nor more than $250.

(c) If no stop order is in effect and no proceeding for the issuance of a stop order is pending, a registration statement under this section shall automatically become effective at three o'clock in the afternoon of the second full business day after filing of the registration statement or the last amendment thereto or at such earlier time as the Commonwealth may determine by order, letter or telegram.

(d) The Commission may require that a prospectus be used in connection with the offering. If the Commission requires the use of a prospectus, it shall be unlawful to sell any security registered under this section except upon delivery of a prospectus to each person to whom an offer is made. The prospectus shall contain such information specified in subsection (b) of § 13.1-510 as may be designated by the Commission as necessary for the protection of investors and such additional information as the Commission may require. (1956, c. 428; 1981, c. 168; 1984, c. 771; 1993, c. 179.)

§ 13.1-509. Registration by coordination.

(a) Any security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination if no stop order or refusal order is in effect against such registration statement and no proceeding looking toward such an order is pending.

(b) A registration statement under this section shall consist of the prospectus filed under the Securities Act of 1933 together with all amendments or supplements thereto and a statement of the amount and maximum offering price of the securities proposed to be offered in this Commonwealth. The Commission may require that it also include the articles of incorporation and bylaws, andy agreements with underwriters, any indenture or any other instrument governing the issuance of the security to be registered, a specimen of the security and any other information documents filed under the Securities Act of 1933. The registration statement shall be accompanied by a fee of 1/20 of one percent of the maximum aggregate offering price of the securities proposed to be offered in this Commonwealth; provided that the fee shall not be less than $200 nor more than $700, except that in the case of a unit

investment trust, as that term is defined in the Investment Company Act of 1940, the fee shall not be less than $400 nor more than $1,000.

(c) A registration statement under this section shall automatically become effective at the moment the federal registration statement becomes effective if all of the following conditions are satisfied: (i) No stop order is in effect and no proceeding for the issuance of a stop order is pending; and (ii) the registration statement and all amendments other than a final amendment (hereinafter termed the "price amendment") which is limited substantially to information concerning the offering, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price have been on file with the Commission for at least three full business days. Unless the definitive information concerning price and other matters dependent upon the offering price have been on file with the Commission, the registrant shall promptly notify the Commission by telephone or telegram of the date and time when the federal registration statement became effective and the content of the federal price amendment, if any, and shall promptly file a post-effective amendment containing the information in the federal price amendment but exclusive of exhibits. Failure to receive such notification or such post-effective amendment if required shall be grounds for the entry of a stop order retroactively denying effectiveness to the registration statement, without notice or hearing, if the Commission promptly notifies the registrant by telephone or telegram (and promptly confirms by letter telegram when it notifies by telephone) of the issuance of such an order. If the registrant proves that he complied with the requirements of this subsection as to notice and post-effective amendment, the stop order shall be void as of the time of its entry. The Commission may, by order, letter or telegram, accelerate the effectiveness of any registration statement and may waive any

or all of the conditions specified in clause (ii) above. If the federal registration has become effective before all of such conditions have been satisfied and they have not so waived, the registration statement under this section shall automatically become effective as soon as all of such conditions have been satisfied. (1956, c. 428; 1984, c. 771; 1990, c. 90.)

§ 13.1-510. Registration by qualification.

(a) Any security may be registered by qualification.

(b) A registration statement under this section shall contain that part of the following information as required by the Commission:

(1) With respect to the issuer and any significant subsidiary: its name, address and form of organization; the state (or foreign jurisdiction) and date of its organization; the general character of its business; and a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) With respect to every director and officer of the issuer (or person occupying a similar status or performing similar functions): his name, address and principal occupation for the last five years; the amount of securities of the issuer held by him as of a specified date within ninety days of the filing of the registration statement; the amount of the securities covered by the registration statement to which he has indicated his intention to subscribe; and a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected;

(3) With respect to person covered by subdivision (2) of this subsection: the remuneration paid during the past twelve months and estimated to be paid during the ensuing twelve months, directly or indirectly, by the issuer (together with all predecessors, parents, subsidiaries and affiliates) to all such persons in the aggregate;

(4) With respect to any person owning of record, or beneficially if known, ten percent or more of the outstanding shares of any class of equity security of the issuer: the information specified in subdivision (2) of this subsection other than his occupation;

(5) With respect to every promoter if the issuer was organized within the past three years: the information specified in subdivision (2) of this subsection, any amount paid to him within such period or intended to be paid to him and the consideration for any such payment;

(6) With respect to any person other than the issuer on whose behalf any part of the offering is to be made: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; a description of any material interest in any material transaction with the issuer or any subsidiary effected within the past three years or proposed to be effected; and a statement of his reasons for making the offering;

(7) The capitalization and long term debt (on both a current and a pro forma basis) of the issuer and any subsidiary, including (i) a description of each class of security outstanding or being registered or otherwise offered, and (ii) a statement of the amount and kind of consideration (whether in the form of cash, physical assets, services, patents, goodwill or anything else) for which the issuer or any such subsidiary

has issued any of its securities within the past two years or is obligated to issue any of its securities;

(8) The kind and amount of securities to be offered; the proposed offering or the method by which it is to be computed; any variation therefrom at which any portion of the offering is to be made to any person or class of persons other than the underwriters, with a specification of any such person or class; the basis upon which the offering is to be made if otherwise than cash; the estimated aggregate underwriting and selling discounts or commissions and finder's fees (including separately cash, securities, contracts or anything else of value to accrue to the underwriters in connection with the offering) or, if such discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering and accounting charges; the name and address of every underwriter and every recipient of a finder's fee; a copy of any underwriting or selling-group agreement pursuant to which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(9) The estimated cash proceeds to be received by the issuer from the offering; the purposes for which such proceeds are to be used by the issuer; the amount to be used for each purpose; the order of priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve such purposes; the sources of any such funds; and, if any part of the proceeds is to be used to acquire any property (including goodwill) otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection

with such acquisition (including the cost of borrowing money to finance such acquisition);

(10) A description of any stock options (or other security options) outstanding, or to be created in connection with the offering, together with the amount of any such options held or to be held by every person required to be named in subdivisions (2), (4), (5), (6) or (8) of this subsection and by any person who holds or will hold ten percent or more in the aggregate of any such options;

(11) The dates of, parties to and general effect concisely stated of, every management or other material contract made or to be made otherwise than in the ordinary course of business if it is to be performed in whole or in part at or after the filing of the registration statement or was made within the past two years, together with a copy of every such contract; and a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business or assets (including any such litigation or proceeding known to be contemplated by governmental authorities);

(12) A copy of any prospectus, pamphlet, circular, form letter, advertisement or sales literature intended as of the effective date to be used in connection with the offering;

(13) A specimen of the security being registered; a copy of the issuer's articles of incorporation and bylaws (or their substantial equivalents) as currently in effect; and a copy of any indenture or other instrument covering the security to be registered;

(14) An opinion of counsel as to the legality of the security being registered which shall state whether the security

when sold will be legally issued, fully paid and nonassessable, and if a debt security, a binding obligation of the issuer;

(15) A balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; a profit and loss statement and analysis of surplus for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessor's existence if less than three years; and if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements which would be required if such business were the registrant;

(16) Such additional information as the Commission may require.

(c) A registration statement shall state the amount of securities to be offered in this Commonwealth and shall be accompanied by a filing fee of 1/10 of one percent of the maximum aggregate offering price at which the securities are proposed to be offered in this Commonwealth; provided that the fee shall not be less than $250 nor more than $500.

(d) A registration statement under this section shall become effective the Commission so orders.

(e) It shall be unlawful to sell any security registered under this section that constitutes the whole or a part of an unsold allotment or subscription by a broker-dealer as a participant in the underwriting of such securities except upon delivery to the purchaser of a prospectus. The prospectus shall contain such part of the information specified in subsection (b) as may be designated by the Commission as necessary for the protection of investors.

(f) The Commission shall have authority in its discretion to require that sales be made only pursuant to a subscription contract the form of which shall have been filed as an exhibit to the registration statement. If the Commission requires a subscription contract, it shall be unlawful to sell any security registered under this section except pursuant to such a subscription contract duly signed by the purchaser, a copy of which shall be delivered to him.

(g) [Repealed.]

(h) If any prospectus, document or exhibit filed as provided in this section discloses that nay of the securities sought to be registered by qualification, or as much as twenty-five percent of any class of the securities of the issuer to be outstanding, were or are intended to be issued for any patent right, copyright, trademark, process, formula, goodwill or other intangible assets, or for organization or promotion fees or expenses, the Commission may require that such securities shall be delivered in escrow to some satisfactory depository under an escrow agreement. The owners of such securities shall not be entitled to sell or transfer such securities or to withdraw such securities from escrow until the issuer in any period of thirty-six consecutive months earns an annual average of six percent of the public offering price times all shares of common stock then outstanding plus those to be outstanding through the exercise of warrants or options as computed under normal and customary accounting procedures or upon order of the Commission, when no circumstance is apparent which, in the opinion of the Commission, would warrant continuation of the escrow. In case of dissolution of insolvency during the time such securities are held in escrow, the owners of such securities shall not participate in the assets until after the owners of all other securities shall have been paid for the account of the issuer, and not by underwriters who have or at the time of offering shall have purchased such

securities from the issuer, the Commission may require that the proceeds from the sale of such securities be delivered in escrow to some satisfactory depository until all or a reasonable portion of the total securities originally proposed to be offered and sold shall have been sold and paid for.

For the purposes of this section, such securities shall be deemed to have been sold and paid for at such time as the subscribers therefore deliver to, or for the benefit of, the issuer, an amount equal to the purchase price specified for such securities either in cash, a draft, check or note (other than any such instrument which is drawn without recourse) or any combination thereof. (1956, c. 428; 1982, c. 362; 1983, c. 517; 1984, c. 771; 1993, c. 180.)

§ 13.1-513. Stop orders.

(a) The Commission may issue a stop order denying effectiveness to, or revoking the effectiveness of, any registration statement if it finds that such an order is in the public interest and that:

(1) The registration statement together with any amendments, or any report filed by the registrant or any other document filed in connection with the registration statement contained any statement which was, at the time and in the circumstances in which it was made, false or misleading with respect to any material fact or omitted to state any material fact required to be stated therein;

(2) The applicant or registrant or any agent, partner, officer or director of the applicant or registrant (or any person occupying a similar status or performing similar functions) or any person directly or indirectly controlling or controlled by the applicant or registrant has violated, in connection with the

offering, any provision of this chapter or of any other law applicable to the offering, or any rule, order or condition lawfully imposed under this chapter;

(3) Any person specified in subdivision (2) of this subsection has failed to furnish any information lawfully requested by the Commission;

(4) The right to sell the securities which are the subject of the registration statement has been denied or revoked or is suspended under any federal act applicable to the offering (and such denial, revocation or suspension is still in effect);

(5) The issuer is insolvent, either in the sense that its liabilities exceed its assets or in the sense that it cannot meet its obligations as they mature;

(6) The issuer's business includes or probably will include activities which are forbidden by law;

(7) The offering has worked or tended to work a fraud upon investors or probably will so operate; or

(8) Where a security is to be or has been registered by notification, it is not eligible for such registration.

(b) No stop order shall be entered without reasonable notice to the applicant or registrant.

(c) In any proceeding under this section, the Commission may refrain from issuing or, after issuing, may revoke a stop order on condition that the persons against whom it is directed correct the matters complained of on which it is based. (1956, c. 428; 1960, c. 71.)

§ 13.1-514. Exemptions.

(a) The following securities are exempted from the securities requirements of this chapter:

(1) Any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;

(2) Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by such issuer or guarantor;

(3) Any security issued by and representing an interest in or a debt of, or guaranteed by, the International Bank for Reconstruction and Development, or any national bank or any bank or trust company organized under the laws of any state or trust subsidiary organized under the provisions of § 6.1-32.1 *et seq.*;

(4) Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or by any savings and loan association which is organized under the laws of this Commonwealth;

(5) Any security issued or guaranteed by an insurance company licensed to transact insurance business in this Commonwealth;

(6) Any security issued by any credit union, industrial loan association or consumer finance company which is organized under the laws of this Commonwealth and is supervised and examined by the Commission;

(7) Any security issued or guaranteed by any railroad, other common carrier or public service company supervised as to its rates and the issuance of its securities by a governmental authority of the United States, any state, Canada or any Canadian province;

(8) Any security which is listed or approved for listing upon notice of issuance on the New York Stock Exchange or American Stock Exchange or any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants admitted to trading in any of said exchanges; or any warrant or right to subscribe to any of the foregoing securities;

(9) Any commercial paper which arises out of current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months after the date of issuance, exclusive of days of grace, or any renewal thereof which is likewise limited, or any guaranty of such paper or any such renewal;

(10) Any security issued in connection with an employee's stock purchase, savings, pension, profit-sharing or similar benefit plan;

(11) Any security issued by a cooperative association organized as a corporation under the laws of this Commonwealth;

(12) Any security listed on an exchange registered with the United States Securities and Exchange Commission and approved by regulations of the State Corporation Commission;

(13) Any security issued by any issuer organized under the laws of any foreign country and approved by rule or regulation of the Commission.

(b) The following transactions are exempted from the securities, broker-dealer and agent registration requirements of this chapter except as expressly provided in this subsection:

(1) Any isolated transaction by the owner or pledgee of a security, whether effected through a broker-dealer or not, which is not directly or indirectly for the benefit of the issuer;

(2) Any nonissuer distribution by a registered broker-dealer and its registered agent of a security that has been outstanding in the hands of the public for the past five years, if the issuer in each of the past three fiscal years has lawfully paid dividends on its common stock aggregating at least four percent of its current market price;

(3) Any transaction by a registered broker-dealer and its registered agent pursuant to an unsolicited order or offer to buy;

(4) Any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust or by an agreement for the sale of real estate or chattels, if the entire indebtedness secured thereby is offered and sold as a unit;

(5) Any transaction in his official capacity by a receiver, trustee in bankruptcy or other judicially appointed officer selling securities pursuant to court order;

(6) Any offer or sale to a corporation, investment company or pension or profit-sharing trust or to a broker-dealer;

(7) Any sale of its securities by an issuer or any sale of securities by a registered broker-dealer and its registered agent acting on behalf of an issuer if, after the sale, such issuer has not more than thirty-five security holders, and if its securities have not been offered to the general public by advertisement of solicitation. The number of security holders of an issuer shall not be deemed to include the security holders of any other corporation, partnership, unincorporated association or trust unless it was organized to raise capital for the issuer. Notwithstanding the provisions of subdivision 15, the merger or consolidation of corporations shall be a violation of this chapter if the surviving or new corporation has more than thirty-five security holders and all the securities of the parties thereto were issued under this exemption, unless all of the parties thereto have been engaged in transacting business for more than two years prior to the merger or consolidation;

(8) Any transaction pursuant to an offer to existing security holders of the issuer including holders of transferable warrants issued to existing security holders and exercisable within ninety days of their issuance, if either (i) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this Commonwealth, or (ii) the issuer first notifies the Commission in writing of the terms of the offer and the Commission does not by order disallow

the exemption within five full business days after the date of the receipt of the notice;

(9) Any offer (but not a sale) of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933; but this exemption shall not apply while a stop order is in effect or, after notice to the issuer, while a proceeding or examination looking toward such an order is pending under either act;

(10) The issuance of not more than three shares of common stock to one or more of the incorporators of a corporation and the initial transfer thereof;

(11) Sales of an issue of bonds, aggregating $150,000 or less, secured by a first lien deed of trust on realty situated in Virginia, to thirty persons or less who are residents of Virginia;

(12) Any offer or sale of any interest in any partnership, corporation, association or other entity created solely to provide residential housing located in the Commonwealth, provided that such offer or sale is by the issuer or by a real estate broker or real estate agent duly licensed in Virginia;

(13) The Commission is authorized to create by rule a limited offering exemption, the purpose of which shall be to further the objectives of compatibility with similar exemptions from federal securities regulation and uniformity among the states; providing, that such rule shall not exempt broker-dealers or agents from the registration requirements of this chapter. Any filing made with the Commission pursuant to any exemption created under this subdivision shall be accompanied by a $250 fee;

(14) The issuance of any security dividend, whether the corporation distributing the dividend is the issuer of the security or not, if nothing of value is given by stockholders for the distribution other than the surrender of a right to a cash dividend where the stockholder can elect to take a dividend in cash or in a security;

(15) Any transaction incident to a right of conversion or a statutory or judicially approved reclassification, recapitalization, reorganization, quasi-reorganization, stock split, reverse stock split, merger, consolidation, sale of assets, or exchange of securities;

(16) Any offer or sale of a security issued by a Virginia church if the offer and sale are only to and by its members who are Virginia residents and who do not receive remuneration or compensation directly or indirectly for offering or selling the security.

(c) In any proceeding under this chapter, the burden of proving an exemption shall be upon the person claiming it (Code 1950 § 13-113; 1956, c. 428; 1966 c. 186; 1970, c. 286; 1972, c. 683; 1974, cc. 86, 830; 1975, cc. 75, 500; 1976, c. 656; 1977, c. 111; 1978, c. 397; 1981, cc. 347, 356, 362; 1982, c. 262; 1983, cc. 231, 516; 1984, cc. 298, 771; 1989, c. 388; 1990, c. 6; 1991, c. 223; 1993, c. 75.)

§ 13.1-514.1. Exemption of certain securities by order of Commission.

(a) The Commission may by order exempt from the other provisions of this chapter any security that the Commission finds:

(1) Is to be offered and sold as part of a community undertaking to attract new business or industry to the community, or to establish or continue financial assistance to an existing business or industry in the community.

(2) Is sponsored by the local chamber of commerce, by a local industrial development corporation or by other groups of representative local businessmen, and

(3) Is to be sold mainly to persons interested in the development of the community by salesmen who receive no compensation for offering and selling the security.

(b) The Commission may also exempt any security it finds that is to be offered and sold by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic or reformatory purposes, or as a chamber of commerce or trade or professional association. (1960, c. 71; 1976, c. 656; 1993, c. 75.)

§ 13.1-520. Crimes.

(a) Any person who shall knowingly and willfully make, or cause to be made, any false statement in any book of account or other paper of any person subject to the provisions of this chapter, or knowingly and willfully exhibit any false paper to the Commission, or who shall knowingly and willfully commit any act declared unlawful by this chapter, with the intent to defraud any purchaser of securities or with the intent to deceive the Commission as to any material fact for the purpose of inducing the Commission to take any action or refrain from taking any action pursuant to this chapter, shall be guilty of a Class 4 felony.

(b) Any person who shall knowingly make or cause to be made false statement in any book of account or other paper of any person subject to the provisions of this chapter or exhibit any false paper to the Commission or who shall commit any act declared unlawful by this chapter shall be guilty of a misdemeanor, and on conviction, be punished by a fine of not less than $100 nor more than $5,000, or by confinement in jail for not less than 30 days nor more than 1 year, or by both such fine and imprisonment.

§ 18.2-178. Obtaining money or signature, etc., by false pretense.

If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be guilty of a Class 4 felony. (Code 1950, § 18.1-118; 1960, c. 358; 1975, cc. 14, 15.)

Virginia Securities Act Rules

Rule 215. Application for Registration as an Agent of the Issuer.

A. Application for registration as an agent of the issuer shall be filed on and in compliance with all requirements and forms prescribed by the Commission.

B. An application shall be deemed incomplete for purposes of applying for registration as an agent of the issuer unless the following executed forms, fee and information are submitted:

1. Form U-4.

2. The statutory fee in the amount of $30.00. The check must be may payable to the Treasurer of Virginia.

3. Completed Agreement for Inspection of Records Form.

4. Provide evidence in the form of a NASD exam report of obtaining a minimum passing grade of 70% on the Uniform Securities Agent State Law Exam, "USASLE", Series 63 exam. (Rule 221)

5. Any other information the Commission may require.

C. The Commission shall either grant or deny each application for registration within thirty (30) days after it is filed. However, if additional time is needed to obtain or verify information regarding the application, the Commission may extend such period as much as ninety (90) days by giving written notice to the applicant. No more than three such

extensions may be made by the Commission on any one application. An extension of the initial thirty-day period, not to exceed ninety (90) days, shall be granted upon written request of the applicant.

Rule 300. Notice of Civil, Criminal or Administrative Action.

A. An applicant or registrant shall notify the Commission:

1. Within thirty (30) calendar days of the date a complaint is served giving notice of any civil, criminal or administrative charges or a formal order or investigation including any such charge or order by a self-regulatory organization registered under the Securities Exchange Act of 1934 against the applicant or registrant which directly or indirectly relates to the registration or sale of securities, or which directly or indirectly relates to the applicant's or registrant's activities as a broker-dealer or agent, or any other activity in which a breach of trust is alleged.

2. Within thirty (30) calendar days of the date filed, any answer or reply to any complaint filed as outlined in subsection A.1. above;

3. Within thirty (30) calendar days of the date of decision, order or sanction rendered or any appeal filed with respect to such decision with regard to any complaint outlined in subsection A.1. above.

B. One (1) copy of such complaint, answer or reply, decision, order or sanction shall be filed with the Commission at the time of notification in accordance with A.1., A.2. and A.3. of this Rule.

Rule 304. Record Keeping.

A. Every broker-dealer shall make and keep current a record for each person who becomes a customer after the effective date of this Rule, which record shall state:

1. The customer's name, date of birth, address, nationality or citizenship, tax identification or social security number, and signatures of the customer, the agent regularly handling the account and a supervisor designated pursuant to subsection C. of Rule 303.

2. If the broker-dealer, or any of its agents, has made any recommendations to the customer to purchase, sell or exchange any security, the record of such customer shall also state the customer's occupation, marital status, investment objectives, other information concerning the customer's financial situation and needs which the broker-dealer or the agent considered in making the recommendation, and the signature of the broker-dealer or agent who made the recommendation to the customer.

B. If, after the effective date of this Rule, a broker-dealer or any agent of such broker-dealer, has made any recommendation to a person who became a customer prior to the effective date of this Rule, the broker-dealer shall make and keep current a record for such customer which shall state the information required by subsections A.1. or A.2. of this Rule.

C. Any item of information required by subsection A.1. or A.2. of this Rule need not be contained in the customer's records if, after reasonable inquiry, the customer declines to furnish such items of information and a statement to that effect is placed in such records; provided, however,

that the customer's records must state the customer's name, address and social security or tax identification number.

D. Every broker-dealer shall make and keep current:

1. A record or records with respect to each discretionary account which shall include:

a. The customer's written authorization to exercise discretionary power or authority in the customer's account.

b. The reason given by the customer for granting discretionary power or authority in the customer's account.

c. The written approval of a supervisor designated pursuant to subsection C. of Rule 303 and, if appropriate, the written approval of the person or persons designated pursuant to subsection E. of Rule 303 of the delegation of discretionary authority.

d. The written approval of a supervisor designated pursuant to subsection C. of Rule 303 of each transaction in such account indicating the exact time and date of such approval.

2. A separate file for all complaints by customers and persons acting on behalf of customers. Such complaints shall be filed alphabetically by customer's name and shall include copies of all material relating to the complaint, and record of what action, if any, has been taken by the broker-dealer. Copies of such material and record of action taken shall be kept in the office through which the customer account is handled.

E. Every broker-dealer shall preserve all records required by this Rule for a period of not less than six years.

the most recent two years of which shall be in an easily accessible place; a photograph on film may be substituted for the records for the balance of the required time.

Agreement For Inspection of Records

_____

(Name of Issuer, Broker-Dealer or Agent)

(hereinafter "Applicant") hereby agrees and represents as a condition of registration of its securities or of granting its application for registration as a broker-dealer or as an agent under the Securities Act of Virginia:

I.

(A) That all of Applicant's records, immediately upon the request of the Commission will be made available for inspection by the Commission and reproduction for the Commission in the office where such records are maintained;

(B) That all of Applicant's records (or legible copies of same, or print-outs of same, if automated) pertaining to a securities transaction any part of which occurred or is to occur within the Commonwealth of Virginia will be made available for inspection by the Commission in the office of the Commission's Division of Securities and Retail Franchising within 48 hours after request of the Commission for same;

(C) That the term "records" shall mean and include all books, papers, documents, tapes, films, photographs or other materials, regardless of physical form or characteristics, (1) that are maintained for the recordation or storage of information prepared, used or to be used in connection with a

securities transaction or (2) that were used or are to be used in connection with a securities transaction; and

(D) That the address at which the records is maintained is _____, and that if this address changes, then the Applicant immediately will give written notification to the Commission of the correct address.

II.

The Applicant understands:

(A) That failure to comply with the terms of Part I of this Agreement may be considered grounds for the institution of a proceeding to revoke a broker-dealer's or agent's registration or the effectiveness of a registration statement.

(B) That any issuer, broker-dealer or agent subject to an investigation made by the Commission may be required to pay the actual costs of the investigation including $20 per day for the time of the investigator.

_____
(Signature of Agent)

_____
(Name of Issuer or Broker-Dealer)

_____ By: _____
Date (Signature)

_____
(Typed or Printed Name of Signer)

_____ _____
(Contact Person) (Title)

_____ _____
(Telephone Number) (Date)

(SEAL OF SURETY)

_____
(Surety)

By _____
(Officer or Attorney-in-Fact)

Countersigned by

_____
(Name of Agency)

_____
(Resident Virginia Agent)

Date _____

United States Code

15 USCS § 77b

When used in this title [15 USCS §§ 77a et seq.] unless the context otherwise requires --

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

15 USCS § 77x. Penalties.

Any person who wilfully violates any of the provisions of this title [15 USCS §§ 77a et seq.], or the rules and regulations promulgated by the Commission under authority thereof, or any person who wilfully, in a registration statement filed under this title [15 USCS §§ 77a et seq.], makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $10,000 or imprisoned not more than five

years, or both. (May 27, 1933, ch 38, Title I, § 24, 48 Stat. 87; June 4, 1975, P.L. 94-29, § 27(a), 89 Stat. 163.)

7B Uniform Laws Annotated § 401. [Definitions]

When used in this act, unless the context otherwise requires:

. . .

(l) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay [a fixed sum of] money either in a lump sum or periodically for life or for some other specified period.

7B Uniform Laws Annotated § 409. [Criminal Penalties]

(a) Any person who willfully violates any provision of this act except section 404, or who willfully violates any rule or order under this act, or who willfully violates section 404 knowing the statement made to be false or misleading in any material respect, shall upon conviction be fined not more than $5,000 or imprisoned not more than three years, or both; but no person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

Constitution of the United States of America

Amendment 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5

Criminal actions -- Provisions concerning -- Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.